

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

_____	X	
In re:	:	Chapter 11
	:	Case No. 07-12148 (BRL)
ALPER HOLDINGS USA, INC.,	:	
	:	
Debtor.	:	
_____	X	
JON AND CHARLOTTE ARMSTRONG,	:	
	:	
Appellants,	:	District Court
	:	Case No. 08-cv-02489-CM
v.	:	(Consolidated)
	:	
ALPER HOLDINGS USA, INC.,	:	
	:	
Appellee.	:	
_____	X	
HARRY HOLT, et al.,	:	
	:	
Appellants,	:	
	:	
v.	:	
	:	
ALPER HOLDINGS USA, INC.,	:	
	:	
Appellee.	:	
_____	X	
RAY AND CATHY FLAKE,	:	
	:	
Appellants,	:	
	:	
v.	:	
	:	
ALPER HOLDINGS USA, INC.,	:	
	:	
Appellee.	:	
_____	X	

_____	X
	:
THE ADKINS CLAIMANTS,	:
	:
Appellants,	:
	:
v.	:
	:
ALPER HOLDINGS USA, INC.,	:
	:
Appellee.	:
_____	X

**APPENDIX OF ITEMS INCLUDED IN BRIEF OF APPELLEE**

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**TAB 1**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

ALPER HOLDINGS USA, et al.

Debtors.

Chapter: 11

Case No.: 07-12148 (BRL)  
Jointly Administered

**MEMORANDUM DECISION AND ORDER GRANTING OBJECTIONS  
OF ALPER HOLDINGS USA, INC. TO PROOFS OF CLAIM FILED BY  
(i) ARMSTRONG PLAINTIFFS AND (ii) HOLT PLAINTIFFS**

Alper Holdings USA, Inc. (“Alper”), the debtor, seeks entry of an order disallowing and expunging (i) claim numbers 12 and 13 (the “Armstrong Claims”) filed by the Armstrong Plaintiffs<sup>1</sup> (the “Armstrong Objection”) and (ii) claim numbers 35 through 45 (the “Holt Claims,” and together with the Armstrong Claims, the “Claims”) filed by the Holt Plaintiffs<sup>2</sup> (the “Holt Objection,” and together with the Armstrong Objection, the “Objections”), pursuant to section 502 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). The Armstrong Plaintiffs and the Holt Plaintiffs oppose the Objections.

For the reasons set forth below and at oral argument, and in accordance with this Court’s previous Memorandum Decision on Objection of Alper to Proofs of Claim (Claim Nos. 29 and 21) filed by Flake Plaintiffs dated January 15, 2008 (the “Flake Opinion”), the Court finds Alper cannot be held liable, directly or indirectly, for claims arising out of or relating to Saltire Industrial, Inc.’s (“Saltire”) alleged contamination or remediation in Dickson County, Tennessee. Therefore, the Claims are disallowed.

<sup>1</sup> The Armstrong Plaintiffs include Charlotte Armstrong and Jon Armstrong (together, the “Armstrong Plaintiffs”).

<sup>2</sup> The Harry Holt Plaintiffs include Harry Holt, Beatrice Holt, Sheila Holt-Orstead, Jasmine Orsted, Bonita Holt, O’Brian Holt, Brandon Holt, Patrick Holt, Bianca Bentley, Demetrius Holt and David Brown (collectively, the “Holt Plaintiffs”).

## **BACKGROUND**

This Court has previously discussed the facts and circumstances preceding Alper's bankruptcy at length in the Flake Opinion, including a discussion of Saltire and the contamination in Dickson County, Tennessee, and the Court generally refers all parties to the Flake Opinion. Briefly, the Armstrong Claims and Holt Claims, much like other claims this Court has had the opportunity to address in these proceedings, both arise in connection with groundwater contamination and environmental problems that arose as far back as the mid-1960's in Dickson County, Tennessee, that were allegedly caused, in part, by Saltire (an incidental and indirect subsidiary of Alper). From approximately 1964 until March 1985, Saltire operated a plant in Dickson County (the "Dickson Plant") where it made automotive tire valves and associated products and where trichloroethylene ("TCE") was used as a degreaser. The Dickson Plant ceased operations in March 1985. Since filing for bankruptcy on July 13, 2007, numerous parties have filed claims against Alper based on, among other things, Saltire's alleged contamination in Dickson County.

### **The Flake Opinion**

On January 15, 2008, this Court issued the aforementioned Flake Opinion, which granted Alper's objection to certain claims asserted by Cathy and Ray Flake (together, the "Flake Plaintiffs") arising out of claims similar to those presently at issue for personal and property damages based upon the alleged contamination in Dickson County. *In re Alper Holdings USA*, 07-12148 (BRL), 2008 WL 160203 (Bankr. S.D.N.Y. Jan. 15, 2008). In that instance, the Flake Plaintiffs claimed (the "Flake Claims") to have suffered personal and property damage due to the intentional or negligent failing of Alper (along with 20 other defendants) to "adequately monitor, control, supervise and/or maintain the disposal of the TCE at all locations throughout Dickson."

As is also presently the case, the Flake Plaintiffs alleged theories of both direct and indirect liability against Alper.

This Court granted Alper's objection and disallowed the Flake Claims based in large part upon the facts that (i) Alper's ownership interest in Saltire was not only indirect but also incidental as Alper only became the controlling shareholder of Saltire in connection with the reorganization of Saltire's parent First City Industries, Inc.<sup>3</sup> ("First City") and (ii) Alper had no connection or relationship to Saltire or Dickson County prior to obtaining an indirect ownership interest in Saltire in 1992 – nearly two decades after the alleged contamination first occurred and at least seven years after the Dickson Plant was closed. Specifically, this Court found that Alper had no direct liability to the Flake Plaintiffs because (a) it was Saltire and not Alper that operated the Dickson Plant and, therefore, Alper owed no duty of care to the Flake Plaintiffs, and (b) the Flake Plaintiffs failed to set forth any facts that Alper actually participated in or oversaw Saltire's remediation in Dickson County that would support a finding that Alper may have assumed a duty of care to the Flake Plaintiffs. *Id.* at \*4-5.

This Court also found that Alper had no indirect liability to the Flake Plaintiffs on either a theory of alter ego or piercing the corporate veil because neither the existence of a management agreement between Alper and Saltire nor a common employee between the parent and subsidiary would justify the extraordinary remedy of piercing the corporate veil as argued by the Flake Plaintiffs. *Id.* at \*5-6. In so holding, the Court clearly held that "Alper cannot be held liable, directly or indirectly, for claims arising out of or relating to Saltire's alleged contamination or remediation in Dickson County, Tennessee." *Id.* at \*7. With that introduction in mind, the Court now proceeds with the claims presently at issue.

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<sup>3</sup> As a creditor of First City, Alper received shares of stock as a stock-for-debt distribution in the reorganized First City on account of its allowed claim pursuant to First City's plan of reorganization. *See* Transcript of January 8, 2008 Hearing, at 25-26.

### **THE ARMSTRONG CLAIMS**

On or about September 19, 2007, the Armstrong Plaintiffs filed their original proofs of claim (the “Original Proofs of Claim”) asserting contingent, unliquidated, and disputed property damage claims against Alper. The Original Proofs of Claim were based entirely upon a complaint filed by the Armstrong Plaintiffs against Alper (along with 18 other named defendants) on or about April 8, 2004 (the “Armstrong Complaint”), in which the Armstrong Plaintiffs claim to have suffered a “diminution” in the value of certain real property as a direct result of the “defendants” alleged contamination in Dickson County. The Armstrong Complaint alleged that Alper was liable for the property damages asserted based upon (a) Alper’s own “direct acts and omissions” and (b) a theory that Alper was Saltire’s successor-in-interest. While the Armstrong Complaint alleged that Alper was liable for its own direct acts, the complaint failed to detail with any specificity what those direct acts might actually entail; rather, the Armstrong Plaintiffs relied on broadly pled causes of action asserted generally against the “defendants.”

On February 6, 2008, however, the Armstrong Plaintiffs, undoubtedly daunted by the Flake Plaintiffs’ holding, amended the Original Proofs of Claims (the “Amended Proofs of Claim”).<sup>4</sup> In the Amended Proofs of Claim, the Armstrong Plaintiffs contend for the first time that they were not alleging that Alper caused or contributed to the initial contamination in Dickson County, but rather, that Alper assumed control of the remediation efforts in Dickson

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<sup>4</sup> Alper has objected to the filing of the Amended Proofs of Claim contending that the filing of the Amended Proofs of Claim some five months after the expiration of the September 21, 2007 bar date is “an impermissible amendment to the Original Armstrong Claims because they are based on a set of facts and theory of liability completely different than those asserted in the Original Armstrong Claims and there is no equitable reason to permit the late-filed claims.” Objection of Alper Holdings USA to Amendment of Proofs of Claim (Claim Nos. 12 and 13) Filed by Armstrong Plaintiffs dated February 20, 2008, at ¶ 3.



County and conducted such remediation in a negligent manner. The pleadings attached to the Amended Proofs of Claim sought to build upon the theory first introduced by the Flake Plaintiffs that Alper controlled the remediation in Dickson County (and assumed a duty to the Armstrong Plaintiffs) by further alleging that Nicholas Bauer, the same common employee of Saltire and Alper previously discussed in the Flake Opinion, oversaw the remediation in Dickson County on behalf of Alper.<sup>5</sup> More precisely, the Amended Proofs of Claim allege that Mr. Bauer: (a) considered himself an employee of Alper and not Saltire, (b) was hired by Alper for the sole purpose of overseeing the remediation in Dickson County, (c) represented himself as an Alper official who had responsibility for environmental matters at Saltire, and (d) operated from an office in Virginia, a jurisdiction where only Alper and not Saltire was authorized to do business.

Alper objects to the Armstrong Claims arguing that they (as reformulated in the Amended Proofs of Claims) are fundamentally the same negligent remediation claims that the Court previously dispensed with in the Flake Opinion. Additionally, Alper contends that even if all of the allegations regarding Mr. Bauer are taken as true, the Flake Plaintiffs have still failed to “allege a plausible basis for liability against Alper.” Alper further contends that any claims for alter ego or successor liability must be disallowed because such claims were property of Saltire’s bankruptcy estate and were released under Saltire’s plan of reorganization (the “Saltire Plan”).

In contrast, the Armstrong Plaintiffs claim that the Armstrong Claims should not be dismissed because *inter alia* (a) the Armstrong Plaintiffs’ proofs of claim contained sufficient allegations to survive what they contend is a motion to dismiss, and (b) the Armstrong Plaintiffs’

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<sup>5</sup> The Flake Plaintiffs previously alleged that Mr. Bauer was not an employee of Saltire at all, but rather was hired solely by Alper to deal with the remediation in Dickson County. The Court, however, previously held that not only was Mr. Bauer clearly an employee of Saltire (specifically, vice president of environmental affairs), but also that that he was acting on behalf of Saltire and not Alper in overseeing or participating in the remediation in Dickson County. *In re Alper Holdings*, 2008 WL 160203, at \*6.

alter ego claims against Alper could not have been released under the Saltire Plan because the Armstrong Plaintiffs' alter ego claims were not property of the estate.

As previously discussed in the Flake Opinion, the fact that a parent company and its subsidiary share common employees is insufficient to impose liability on the part of the parent for acts of the subsidiary. *See United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (“[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.”) (internal quotations omitted); *see In re Alper Holdings*, 2008 WL 160203, at \*5-6. Regarding the roles of common or overlapping employees, the United States Supreme Court in *United States v. Bestfoods* stated that “courts generally presume that the directors are wearing their ‘subsidiary hats’ and not their ‘parent hats’ when acting for the subsidiary,” absent a situation where a common employee might “depart so far from the norms of parental influence exercised through dual officeholding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the facility.” 524 U.S. at 69-71; *see also In re Parmalat Securities Litigation*, 501 F. Supp. 2d 560, 588 (S.D.N.Y. 2007).

Like the Flake Plaintiffs before them, the Armstrong Plaintiffs have failed to allege any facts that would justify imposing liability on the part of Alper. Alper's ownership interest in Saltire came about merely as a result of a debt to equity swap in First City's then pending chapter 11 bankruptcy – and the Court will not make use of this incidental ownership interest to hold Alper indirectly liable for events that predated Alper's ownership interest in Saltire by nearly two decades. *See e.g., Da Silva v. Kinsho Intern. Corp.*, 210 F. Supp. 2d 241, 244 (S.D.N.Y. 2000) (“This Court agrees that a parent company should not lightly be held responsible for the acts of its subsidiaries absent proof that the parent was involved in the particular circumstances giving rise to the litigation.”). Most notably, as Alper suggests in its reply, even if all of the allegations

regarding Mr. Bauer and Alper are taken as true, the conduct alleged still falls well short of the “depart[ing] so far from the norms of parental influence” standard set forth by the Supreme Court in *Bestfoods* as the Armstrong Plaintiffs have failed to allege any acts by Mr. Bauer that would overcome the legal presumption that he was acting on behalf of Alper and not Saltire.

Accordingly, as the conduct alleged is insufficient to overcome the legal presumption that Mr. Bauer was acting on behalf of Saltire and not Alper, the Court sees no reason to part ways with the reasoning and rationale previously set forth in the Flake Opinion. *See, e.g., In re Manhattan Invest. Fund Ltd.*, 343 B.R. 63, 67 (S.D.N.Y. 2006) (“The law of the case is a discretionary doctrine, providing ‘that where a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’” While the law of the case is “a discretionary doctrine which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided,” nevertheless, the situations justifying reconsideration are generally limited to “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.”) (internal citations omitted); *641 Ave. of Americas Ltd. Partnership v. 641 Associates, Ltd.*, 189 B.R. 583, 588 (S.D.N.Y. 1995) (“[U]nder the law of the case doctrine, a decision on an issue of law becomes binding precedent in subsequent stages of the same litigation.”). The Court finds no basis to impose a duty on the part of Alper – direct, indirect, assumed or otherwise – and therefore, the Armstrong Claims are disallowed.

### **THE HOLT CLAIMS**

Similar to the Armstrong Claims and the Flake Claims before them, the Holt Claims, which are based upon a separate complaint filed on or about December 3, 2003 (the “Holt Complaint”), assert various claims for both personal and property damage based upon, *inter alia*, Saltire’s negligent contamination at the Dickson Plant and surrounding area. Unlike the

Armstrong Plaintiffs, however, the Holt Plaintiffs allege damages based entirely upon injuries caused by the original contamination in Dickson County and not by any subsequent remediation or negligence. Accordingly, the Holt Plaintiffs' allegations as they pertain to Alper are based entirely on a theory of alter ego liability. In particular, the Holt Plaintiffs assert that Alper is liable as the alter ego of Saltire because (a) Alper was not merely an indirect or incidental parent of Saltire as had been previously contended, but rather was formed for the sole purpose of acquiring First City during its then pending chapter 11 proceeding, (b) Alper dominated and controlled the management and direction of Saltire to a much greater extent than previously suggested, and (c) Alper and First City diverted assets away from Saltire, which left Saltire grossly undercapitalized and eventually necessitated Saltire filing for bankruptcy protection under chapter 11 of the Bankruptcy Code in August 2004.<sup>6</sup>

Alper objects to the Holt Plaintiffs' alter ego and successor liability claims charging that such claims must be disallowed because (i) alter ego claims that Saltire may have had against Alper were property of the estate and were released under the Saltire Plan and (ii) even if such claims were not released pursuant to the Saltire Plan, no alter ego claims could be asserted against Alper because Saltire was a publicly traded company during the entire time that it operated the Dickson Plant and Alper did not exercise any dominion or control over Saltire's operations as required to support such claims.

In response, the Holt Plaintiffs contend that their alter ego claims against Alper were not property of the estate but rather were nondebtor third party claims that Saltire was unable to release under the Saltire Plan because *inter alia* (a) Tennessee law and not Delaware should control the analysis of alter ego claims and under Tennessee law, a debtor does not have the ability to pierce its own corporate veil, and (b) the claims asserted by the Holt Plaintiffs in the

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<sup>6</sup> *In re Saltire Industrial, Inc.*, Case No. 04-15389 (BRL) (Bankr. S.D.N.Y. 2004).

Holt Complaint are personal to the Holt Plaintiffs and could not have been brought by any creditor of Alper.

As previously set forth in the Flake Opinion, courts are very reluctant to disregard the corporate form.<sup>7</sup> *See Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 233 F.R.D. 143, 145 (D. Del. 2005) (“[T]he separate and distinct corporate identities of a parent and its subsidiary are not readily disregarded, except in rare circumstances justifying the application of the alter ego doctrine to pierce the corporate veil of the subsidiary.”); *Sears, Roebuck & Co. v. Sears plc*, 744 F. Supp. 1297, 1305 (D. Del. 1990) (“It is only the exceptional case where a court will disregard the corporate form...”); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 270 (D. Del. 1989) (“Since it is the exceptional instance where a court will disregard the corporate form, the party who wishes the court to disregard that form ‘bears the burden of proving that there are substantial reasons for doing so.’”). Under Delaware law, a corporate veil will not be pierced absent a showing of “fraud or something like it.” *Mobile Oil Corp.*, 718 F. Supp. at 268; *In re Sunstates Corp. S’holder Litig.*, 788 A.2d 530, 534 (Del. Ch. 2001) (“[T]o pierce the corporate veil based on an agency or ‘alter ego’ theory, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.”) (internal quotations omitted).

Under Delaware law, an alter ego cause of action constitutes a corporate right. *See, e.g., In re Enron Corp.*, 2003 WL 1889040, at \*3 (“Based on the fact that Delaware law allows a

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<sup>7</sup> While the Holt Plaintiffs suggest otherwise, it is clear under New York law that the law of the state of incorporation controls the analysis of alter ego claims and, accordingly, Delaware law controls our analysis. *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (“[Under New York choice of law principles, the law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders.”) (internal quotations omitted); *Kalb v. Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (“[b]ecause a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away.”); *see also In re Enron Corp.*, No. 01-16034 (AJG), 2003 WL 1889040, at \*3 (Bankr. S.D.N.Y. Apr. 17, 2003).

subsidiary to maintain an action against a corporate parent, a Delaware court would permit a debtor corporation to assert a claim to pierce its own corporate veil”); *Pereira v. Cogan*, 00-CIV-619, 2001 WL 243537, at \*19-20 (S.D.N.Y. Mar. 8, 2001) (“It may seem strange to allow a corporation to pierce its own veil, since it cannot claim to be either a creditor that was deceived or defrauded by the corporation fiction, or an involuntary tort creditor. However piercing the corporate veil and alter ego actions are allowed to prevent unjust or inequitable results; they are not based solely on a policy of protecting creditors..... [Therefore] it is not incompatible with the purposes of the doctrines to allow a debtor corporation to pursue a claim based upon such a theory.”) citing *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1240 n. 20 (3d Cir. 1994); *Murray v. Miner*, 876 F. Supp. 512, 516 -17 (S.D.N.Y. 1995) (“One can only conclude that for purposes of applying federal bankruptcy law, Delaware courts would permit a debtor corporation to ‘assert[ ] an alter ego claim to pierce its own corporate veil....’”) (internal citations omitted). The law permits a debtor to pierce its own corporate veil because “[a]llowing the trustee or debtor-in-possession to pursue the claim avoids the prospect of creditors seeking to gain advantage over other creditors by pursuing the alter ego claims on a first-come, first-serve basis.” *In re Enron Corp.*, 2003 WL 1889040, at \*4. As the Second Circuit stated in *Kalb, Voorhis & Co. v. American Fin. Corporation*, 8 F.3d 130 (2d Cir. 1993):

[G]ranting the bankruptcy trustee exclusive standing to assert alter ego claims furthers the bankruptcy policy of ensuring that all similarly situated creditors are treated fairly; the alter ego action is based upon allegations that if proven would benefit all [the debtor's] creditors, i.e., making more assets available to satisfy [the debtor's] debts.... If [the individual creditor's] action is not stayed it would collect its claim from a pool of assets that should be available to all creditors.

*Id.* at 132.

“Where a claim is generalized, with no particularized injury stemming from it and where the claim may be brought by any creditor, the trustee or debtor-in-possession is the appropriate

party to assert the claim and creditors are subject to the outcome of the action brought by the trustee or debtor-in-possession.” *In re Enron Corp.*, 2003 WL 1889040, at \*4; *see also Murray v. Miner*, 876 F. Supp. 512, 516 (S.D.N.Y. 1995) (An alter ego claim “belongs to the trustee if (1) under governing state law the debtor could have asserted an alter ego claim to pierce its own corporate veil, and (2) plaintiffs’ claim is a general one, of the type that could be brought by any creditor of the debtor.”).

While the Holt Plaintiffs have further expounded upon the successor liability and alter ego theories previously dispensed with in the Flake Opinion,<sup>8</sup> the Court is not persuaded. Among other things, the Holt Plaintiffs assert that (a) Alper and Saltire operated as a single economic unit maintaining the same office space and overlapping employees, and (b) Alper and First City diverted assets away from Saltire and sold off many of Saltire’s most profitable businesses, leaving it grossly undercapitalized and forcing Saltire to file for bankruptcy. Clearly, claims of gross undercapitalization and fraudulent transfer such as those averred in the Holt Complaint are of a generalized nature and do not allege a “particularized injury” specific to the Holt Plaintiffs only and not Saltire’s body of creditors at large. While this Court previously did not address whether Saltire’s alter ego claims were property of the estate, *see In re Alper Holdings*, 2008 WL 160203, at \* 6, it is clear based upon the conduct presently alleged that such alter ego claims were in fact property of Saltire’s bankruptcy estate and, accordingly, that those alter ego claims were released under section 13.1 of the Saltire Plan.<sup>9</sup> Accordingly, the Holt Claims are disallowed.

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<sup>8</sup> The same, however, cannot be said of the Armstrong Plaintiffs, where counsel for the Armstrong Plaintiffs – who previously served as counsel for the Flake Plaintiffs – essentially restated the very same arguments dismissed by the Court in the Flake Opinion.

<sup>9</sup> Section 13.1(b) of the Saltire Plan states, in pertinent part:

**CONCLUSION**

For the reasons set forth above and at the hearing, and for the reasons set forth in the Flake Opinion, the Court finds that Alper cannot be held liable, directly or indirectly, for claims arising out of or relating to Saltire's alleged contamination or remediation in Dickson County, Tennessee. Therefore, the Claims are disallowed and expunged.

IT IS SO ORDERED.

Dated: New York, New York  
February 25, 2008

/s/ Burton R. Lifland  
The Honorable Burton R. Lifland  
United States Bankruptcy Judge

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The Debtor . . . acquits and forever discharges Alper . . . from any and all actions, causes of action, [and] liabilities . . . in any way relating to the Debtor . . . that the Debtor could assert directly or any Holder of a Claim . . . could assert derivatively or on behalf of the Debtor or its estate . . . . Notwithstanding the foregoing, the above release does not release claims any nondebtor third party may hold against any of the Released Parties, except to the extent any nondebtor third party is asserting a claim that is property of the Debtor's Estate.



**TAB 2**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**FOR PUBLICATION**

In re:

ALPER HOLDINGS USA, et al.

Chapter: 11

Case No.: 07-12148 (BRL)  
Jointly Administered

Debtors.

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**MEMORANDUM DECISION AND ORDER ON OBJECTION OF ALPER  
HOLDINGS USA, INC. TO PROOFS OF CLAIM (CLAIM NOS. 14, 15, 16,  
17, 18, 19, 22, 23, 24, 25, 26, 27, 28) FILED BY THE ADKINS CLAIMANTS**

Before the Court is the objection (the “Adkins Objection”) of Alper Holdings USA, Inc. (“Alper” or the “Debtor”) to certain claims (the “Adkins Claims”) filed by the Adkins Claimants<sup>1</sup>, pursuant to section 502 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). The Adkins Claimants oppose the Adkins Objection asserting that their claims have been sufficiently pled to put Alper on notice. For the reasons set forth below and in accordance with this Court’s previous Memorandum Decision on Objection of Alper to Proofs of Claim (Claim Nos. 29 and 21) filed by Flake Plaintiffs dated January 15, 2008 (the “Flake Opinion”) and

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<sup>1</sup> The Adkins Claimants include Donald Adkins, Kristi Adkins, Hunter Adkins, Chad Beard, Patricia Beard, Emily Beard, Eric Christian, Peyton Christian, Jennifer Casteel, Timothy DeLoach, Kimberly DeLoach, Paxton DeLoach, Anthony Fambrough, Keysha Fambrough, Autumn Fambrough, Shonda Heflin, John Christopher Stiver, Sydney Stiver, David Heimbach, Jodie Heimbach, Kassidy Heimbach, Dawson Heimbach, Mason Heimbach, Scott Herkimer, Darcie Herkimer, Samuel Herkimer, Steven Jones, Melissa Jones, Mya Jones, Barry Piland, Christie Piland, Luke Piland, Travis Wood, Amy Wood and Lauren Wood (collectively, the “Adkins Plaintiffs”) as well as Priscilla Fowler and Jason Stewart -- who together filed proof of claim number 17 -- and James Dakota Stewart, Charity Comeaux, and Joshua Campbell -- who together filed proof of claim 27 (collectively, the “Non-Plaintiff Adkins Claimants” and, together with the Adkins Plaintiffs, the “Adkins Claimants”). The Non-Plaintiff Adkins Claimants are represented by the same counsel, and have filed substantially identical proofs of claim for personal injury/wrongful death claims, as the Adkins Plaintiffs. On information and belief, the Non-Plaintiff Adkins Claimants are asserting substantially similar claims as those asserted by the Adkins Plaintiffs and, accordingly, this Objection addresses the claims of all of the Adkins Claimants.

Memorandum Decision on Objection of Alper to Proofs of Claim Filed by (i) the Armstrong Plaintiffs and (ii) Holt Plaintiffs dated February 28, 2008 (the “Holt/Armstrong Opinion”),<sup>2</sup> this Court *once again* finds Alper cannot be held liable, directly or indirectly, for claims arising out of or relating to Saltire Industrial, Inc.’s (“Saltire”) alleged contamination or remediation in Dickson County, Tennessee. Therefore, the Adkins Claims are disallowed.

### **BACKGROUND**

The Adkins Objection is the latest installment in a series of omnibus claims objections concerning claims based upon groundwater contamination that occurred in Dickson County, Tennessee in the mid-1960’s allegedly caused, in part, by Saltire (an indirect and incidental subsidiary of Alper). Having previously discussed the facts and circumstances preceding Alper’s bankruptcy at length not once, but twice, in both the Flake Opinion and the Holt/Armstrong Opinion, the Court presumes all parties are familiar with the facts and generally refers all parties to those opinions. Briefly, the Adkins Claimants, like the Flakes, Holts and Armstrongs before them, claim to have suffered personal injuries as a result of Saltire’s alleged contamination. From approximately 1964 until March 1985, Saltire operated a plant in Dickson County (the “Dickson Plant”) where it made automotive tire valves and associated products and where trichloroethylene (“TCE”) was used as a degreaser. The Dickson Plant ceased operations in March 1985. Since filing for bankruptcy on July 13, 2007, numerous parties have filed claims against Alper based on, among other things, Saltire’s alleged contamination in Dickson County.

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<sup>2</sup> The parties stipulated at oral argument that in lieu of holding additional argument on the Adkins Claims, the parties would rely on the presentations made in connection with the hearing held on Alper’s objection to the claims of the Armstrong Plaintiffs (as defined below), which the parties mutually agreed consisted of substantially similar legal arguments to those presently at issue.

### **The Flake Opinion**

On January 15, 2008, this Court issued the aforementioned Flake Opinion, which granted Alper's objection to certain claims asserted by Cathy and Ray Flake (together, the "Flake Plaintiffs") for personal and property damages based upon the alleged contamination in Dickson County.<sup>3</sup> *In re Alper Holdings USA*, 07-12148 (BRL), 2008 WL 160203 (Bankr. S.D.N.Y. Jan. 15, 2008). In that instance, the Flake Plaintiffs claimed (the "Flake Claims") to have suffered personal and property damage due to the intentional or negligent failing of Alper (along with 20 other defendants) to "adequately monitor, control, supervise and/or maintain the disposal of the TCE at all locations throughout Dickson." As is presently the case, the Flake Plaintiffs alleged theories of both direct and indirect liability against Alper.

This Court granted Alper's objection and disallowed the Flake Claims based in large part upon the facts that (i) Alper's ownership interest in Saltire was not only indirect but also incidental as Alper only became the controlling shareholder of Saltire in connection with the reorganization of Saltire's parent First City Industries, Inc.<sup>4</sup> ("First City") and (ii) Alper had no connection or relationship to Saltire or Dickson County prior to obtaining an indirect ownership interest in Saltire in 1992 – nearly two decades after the alleged contamination first occurred and at least seven years after the Dickson Plant was closed. Specifically, this Court found that Alper had no direct liability to the Flake Plaintiffs because (a) it was Saltire and not Alper that operated the Dickson Plant and, therefore, Alper owed no duty of care to the Flake Plaintiffs, and (b) the Flake Plaintiffs failed to set forth any facts that Alper actually participated in or oversaw

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<sup>3</sup> Curiously, despite the well-publicized contamination in Dickson County, the Flake Plaintiffs purchased property within 8 miles of the Dickson Plant in 2002 for use as a *water bottling facility*.

<sup>4</sup> As a creditor of First City, Alper received shares of stock as a stock-for-debt distribution in the reorganized First City on account of its allowed claim pursuant to First City's plan of reorganization. *See* Transcript of January 8, 2008 Hearing, at 25-26.

Saltire's remediation in Dickson County that would support a finding that Alper may have assumed a duty of care to the Flake Plaintiffs. *Id.* at \*4-5.

This Court also found that Alper had no indirect liability to the Flake Plaintiffs on either a theory of alter ego or piercing the corporate veil because neither the existence of a management agreement (the "Management Agreement") entered into between Saltire and Alper in 1995 whereby Alper agreed to oversee certain environmental issues nor a common employee between the parent and subsidiary would justify the extraordinary remedy of piercing the corporate veil as argued by the Flake Plaintiffs. *Id.* at \*5-6. In so holding, the Court clearly held that "Alper cannot be held liable, directly or indirectly, for claims arising out of or relating to Saltire's alleged contamination or remediation in Dickson County, Tennessee." *Id.* at \*7.

### **The Holt/Armstrong Opinion**

Despite the clear and unambiguous holding set forth in the Flake Opinion, this Court was compelled to issue another decision on claims stemming out of the Dickson County contamination on February 25, 2008.<sup>5</sup> In the Holt/Armstrong Opinion, *In re Alper Holdings USA*, 07-12148 (BRL), 2008 WL 541154 (Bankr. S.D.N.Y. Feb. 25, 2008), the Court was presented with two separate groups of claimholders, the Armstrong Plaintiffs<sup>6</sup> and the Holt Plaintiffs<sup>7</sup>, both of whom sought to impose liability on Alper for both personal and property damages but under different theories of liability.

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<sup>5</sup> With the exception of the Holt Plaintiffs, the same law firm has represented each of the separate plaintiff groups.

<sup>6</sup> The Armstrong Plaintiffs include Charlotte Armstrong and Jon Armstrong (together, the "Armstrong Plaintiffs").

<sup>7</sup> The Harry Holt Plaintiffs include Harry Holt, Beatrice Holt, Sheila Holt-Orsted, Jasmine Orsted, Bonita Holt, O'Brian Holt, Brandon Holt, Patrick Holt, Bianca Bentley, Demetrius Holt and David Brown (collectively, the "Holt Plaintiffs").

A. The Armstrong Plaintiffs – Assumption of Duty Theory of Liability

In their amended pleadings,<sup>8</sup> the Armstrong Plaintiffs sought to build upon the theory first introduced by the Flake Plaintiffs that Alper controlled the environmental remediation efforts in Dickson County (and assumed a duty to the Armstrong Plaintiffs) by further alleging that Nicholas Bauer, the same common employee of Saltire and Alper previously discussed in the Flake Opinion, oversaw the remediation on behalf of Alper.<sup>9</sup> More precisely, the Armstrong Plaintiffs alleged that Mr. Bauer: (a) considered himself an employee of Alper and not Saltire, (b) was hired by Alper for the sole purpose of overseeing the remediation in Dickson County, (c) represented himself as an Alper official who had responsibility for environmental matters at Saltire, and (d) operated from an office in Virginia, a jurisdiction where only Alper and not Saltire was authorized to do business. Like the Flake Plaintiffs before them, the Armstrong Plaintiffs also pointed to the existence of the Management Agreement as proof that Alper had assumed control of the Dickson County remediation.

Alper objected to the Armstrong Plaintiffs' claims arguing that they were fundamentally the same negligent remediation claims the Court previously dispensed with in the Flake Opinion. Additionally, Alper contended that any claims for alter ego or successor liability should be

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<sup>8</sup> Apparently recognizing that their claims as originally filed (which only set forth damages stemming from the original contamination) would ultimately fail in light of the Flake Opinion, the Armstrong Plaintiffs' subsequently attempted to amend their proofs of claim to include allegations that Alper voluntarily assumed Saltire's remediation efforts in Dickson County and that Alper was negligent in conducting that remediation.

<sup>9</sup> The Flake Plaintiffs previously alleged that Mr. Bauer was not an employee of Saltire at all, but rather was hired solely by Alper to deal with the remediation in Dickson County. The Court, however, previously held that not only was Mr. Bauer clearly an employee of Saltire (specifically, vice president of environmental affairs), but also that that he was acting on behalf of Saltire and not Alper in overseeing or participating in the remediation in Dickson County. *In re Alper Holdings*, 2008 WL 160203, at \*6.

disallowed because such claims were property of Saltire's bankruptcy estate and were released under Saltire's plan of reorganization (the "Saltire Plan").

In contrast, the Armstrong Plaintiffs argued that their claims should not be dismissed because, *inter alia*, (a) the Armstrong Plaintiffs' proofs of claim contained sufficient allegations to survive what they contend was a motion to dismiss, and (b) the Armstrong Plaintiffs' alter ego claims against Alper could not have been released under the Saltire Plan because their claims were not property of the estate.

This Court held that the Armstrong Plaintiffs, like the Flake Plaintiffs before them, had failed to allege any facts that would justify imposing liability on the part of Alper. Once again, this Court stressed that (a) the fact that a parent company (Alper) and its subsidiary (Saltire) shared common employees was insufficient to impose liability on the part of the parent for acts of the subsidiary; and (b) Alper's ownership interest in Saltire came about merely as a result of a debt to equity swap in First City's then pending chapter 11 bankruptcy – and the Court would not make use of such an incidental ownership interest to hold Alper indirectly liable for events that predated Alper's ownership interest in Saltire by nearly two decades. *In re Alper Holdings*, 2008 WL 541154, at \*3-\*4.

#### B. The Holt Plaintiffs – Alter Ego Theory of Liability

In contrast to the assumption of duty theory pursued by the Flake and Armstrong Plaintiffs, the Holt Plaintiffs alleged personal injury damages based entirely upon injuries caused by the original contamination in Dickson County and not by any subsequent remediation or negligence. Accordingly, the Holt Plaintiffs' allegations as they pertained to Alper were based entirely on a theory of alter ego liability.<sup>10</sup>

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<sup>10</sup> In addition to the causes of action asserted against Alper, the Holt Plaintiffs also alleged various causes of action against the city and county of Dickson, the commissioner of the Tennessee Department of Environment and Conservation, and the commissioner of the

The Holt Plaintiffs claimed that Alper was liable as the alter ego of Saltire because (a) Alper was not merely an indirect or incidental parent of Saltire as had been previously contended, but rather was formed for the sole purpose of acquiring First City during its then pending chapter 11 proceeding, (b) Alper dominated and controlled the management and direction of Saltire to a much greater extent than previously suggested, and (c) Alper and First City diverted assets away from Saltire and sold of many of Saltire's most profitable businesses, which left Saltire grossly undercapitalized and eventually necessitated Saltire filing for bankruptcy protection under chapter 11 of the Bankruptcy Code in August 2004.<sup>11</sup>

Alper objected to the Holt Plaintiffs' alter ego and successor liability claims in the same fashion it had previously objected to similar claims by the Flake Plaintiffs charging that such claims should be disallowed because (i) any alter ego claims that Saltire may have had against Alper were property of the estate and were released under the Saltire Plan and (ii) even if such claims were not released pursuant to the Saltire Plan, no alter ego claims could be asserted against Alper because Saltire was a publicly traded company during the entire time that it operated the Dickson Plant and Alper did not exercise any dominion or control over Saltire's operations as required to support such claims.

The Holt Plaintiffs argued that their alter ego claims were not property of the estate but rather were nondebtor third party claims that Saltire was unable to release under the Saltire Plan because, *inter alia*, (a) under Tennessee law (which the Holt Plaintiffs argued controlled the analysis of alter ego claims rather than Delaware, the state of incorporation), a debtor did not have the ability to pierce its own corporate veil, and (b) the claims asserted by the Holt Plaintiffs

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Tennessee Department of Health for, among other things, battery, nuisance and numerous civil rights violations.

<sup>11</sup> *In re Saltire Industrial, Inc.*, Case No. 04-15389 (BRL) (Bankr. S.D.N.Y. 2004).



were personal to the Holt Plaintiffs and could not have been brought by Alper's body of creditors at large.

Although the Court previously declined to address whether Saltire's alter ego claims were property of the estate in the Flake Opinion, *see In re Alper Holdings*, 2008 WL 160203, at \* 6, it was clear based upon the conduct alleged by the Holt Plaintiffs that such alter ego claims were of a generalized nature and did not allege a "particularized injury" specific only to the Holt Plaintiffs. Accordingly, this Court held that such alter ego claims were in fact property of Saltire's bankruptcy estate and were, therefore, released under section 13.1 of the Saltire Plan.<sup>12</sup> *In re Alper Holdings*, 2008 WL 541154, at \*6. As can be seen from the following, the prior holding regarding the Holt Plaintiffs' alter ego claims applies equally to the current Adkins Claimants.

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<sup>12</sup> Section 13.1(b) of the Saltire Plan states, in pertinent part:

The Debtor . . . acquits and forever discharges Alper . . . from any and all actions, causes of action, [and] liabilities . . . in any way relating to the Debtor . . . that the Debtor could assert directly or any Holder of a Claim . . . could assert derivatively or on behalf of the Debtor or its estate . . . . Notwithstanding the foregoing, the above release does not release claims any nondebtor third party may hold against any of the Released Parties, except to the extent any nondebtor third party is asserting a claim that is property of the Debtor's Estate.

### **THE ADKINS CLAIMS**

On or about September 19, 2007, the Adkins Claimants filed their original proofs of claim asserting contingent, unliquidated, and disputed personal injury and wrongful death claims (the “Original Adkins Claims”). The Original Adkins Claims were based entirely upon a complaint (the “Adkins Complaint”) filed by the Adkins Claimants on or about January 9, 2006 against Alper, asserting various claims for personal injuries based upon both direct and indirect theories of liability. Before proceeding, the Court notes the following: (a) despite counsel for the Adkins Claimants’ (the “Esserman Firm”) repeated efforts at differentiating the physical injuries sustained by his clients, the personal injuries allegedly suffered by the Adkins Claimants are nearly identical in all respects to those previously before the Court; and (b) the Adkins Complaint is completely devoid of any allegations of negligent remediation on the part of Alper or claims that Alper assumed a duty of care to the Adkins Claimants. In fact, except for the statements that Alper was liable for its “own direct acts and omission” and as a “successor-in-interest” to Saltire, the Adkins Complaint does not set forth a single specific allegation that would warrant imposing liability on the part of Alper.

On February 28, 2007, Alper filed the Adkins Objection alleging that the Original Adkins Claims were both baseless and facially deficient for all of the same reasons set forth in their previous claims objections, namely that: (a) Alper had no connection or relationship to Dickson County or the Dickson Plant prior to becoming Saltire’s indirect and incidental parent and, therefore, Alper owed no duty of care to the Adkins Claimants; (b) the Adkins Claimants had made no showing aside from the general statement that Alper was being sued based on its “own direct acts and omission” that Alper had engaged in any negligent remediation efforts in Dickson County; and (c) to the extent that the Adkins Claimants were attempting to assert alter ego claims against Alper (like the Flakes, Holts and Armstrong Plaintiffs before them), such claims must be

disallowed because (i) the Court had previously ruled in the Holt/Armstrong Opinion that such claims were property of the estate and released under the Saltire Plan; and (ii) even if such claims were not released under the Saltire Plan, Alper did not exercise any dominion or control over Saltire's operations.

Following the previous dismissal of the Flake and Armstrong Claims as a matter of law, the Esserman Firm reacted on behalf of the Adkins Claimants by attempting to amend the Original Adkins Claims nearly one month after Alper filed the Adkins Objection (the "New Adkins Claims").<sup>13</sup> In the New Adkins Claims and the Adkins Claimants' response to the Adkins Objection (the "Adkins Response"), the Esserman Firm attempts *once again* to resurrect the very same assumption of duty theory this Court previously put to rest in the Flake Opinion and the Holt/Armstrong Opinion. Specifically, the Adkins Response states as follows:

While the Debtor was not involved in the initial contamination in Dickson, the Debtor assumed control of the TCE remediation efforts after its acquisition of Saltire in 1992. The Debtor conducted such remediation in a negligent manner by failing to properly contain the contamination and by allowing the ongoing migration of TCE contaminants to Dickson-area drinking water—thereby causing the Adkins Claimants' injuries.

*See* Adkins Response, at p. 2.

In addition to the assumption of duty theory (which by the Adkins Claimants own admission is their sole bases for imposing direct liability on Alper), the Adkins Claimants also contend – in direct contravention to this Court's holding in the Holt/Armstrong Opinion – that their alter ego claims against Alper were not property of Saltire's bankruptcy estate and could not be released under the Saltire Plan.

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<sup>13</sup> Alper has objected to the filing of the New Adkins Claims as an impermissible amendment to the Original Adkins Claims as they were filed nearly six months after the expiration of the September 21, 2007 bar date. *See* Objection of Alper Holdings USA to Amendment of Proofs of Claim (Claim Nos. 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28) Filed by Adkins Claimants dated April 2, 2008, at ¶ 3.

It is clear from the pleadings before the Court that the Adkins Claimants intend to rely exclusively on the new allegations as set forth in the New Adkins Claims. In response, Alper argues in well grounded fashion that exclusive reliance on the New Adkins Claims is tantamount to a concession that the Original Adkins Claims were deficient as pled. Regardless, the New Adkins Claims may very well be impermissible amendments to the Original Adkins Claims because they are based on a set of facts and theories of legal liability completely different than those asserted in the Original Adkins Claims and there is no equitable reasons to permit the late-filed claims because the Adkins Claims “whether in the amended form or in [their] essential form still [do] not state a plausible, cognizable legal claim under the prevailing law.” *See* Transcript of Hearing Regarding Alper Holdings USA, Inc.’s Objection to Claims of the Harry Holt Plaintiffs and the Armstrong Plaintiffs, dated February 21, 2007, at p. 17.

## **DISCUSSION**

### **Alper Has No Direct Liability to the Adkins Claimants**

To establish a direct cause of action against Alper, the Adkins Claimants must prove that Alper owed a duty to the Adkins Claimants, that the duty was breached, and that the breach was the cause in fact and proximate cause of the Adkins Claimants’ injuries. *See Ham v. Hospital of Morristown, Inc.*, 917 F. Supp. 531, 534 (E.D. Tenn. 1995) (“The law is well settled in Tennessee that, in a cause of action for negligence, there must first be a duty of care owed by the defendant to the plaintiff.”). Recognizing that Alper had no connection or relationship to Saltire or Dickson County prior to obtaining an indirect ownership interest in Saltire nearly two decades after the alleged contamination first occurred and at least seven years after the Dickson Plant closed, the Adkins Claimants now rely solely on their theory that Alper controlled the remediation in Dickson County and assumed a duty of care to the Adkins Claimants to impose direct liability on Alper.

Under Tennessee law, the so-called “Good Samaritan” rule is embodied in Section 324A of the Restatements, which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965).

It is on the second prong of this test – that Alper undertook to perform a duty of Saltire when it assumed control over the remediation in Dickson County – that the Adkins Claimants rest their hat.

In support of this theory, however, the Esserman Firm (who previously served both as counsel for the Flake Plaintiffs and the Armstrong Plaintiffs) does not offer a single shred of new evidentiary support. Indeed, the Adkins Claimants rely on the same arguments previously submitted by the Flake and Armstrong Plaintiffs which were reviewed and dispensed with by this Court, namely the mere existence of the Management Agreement and a common employee (Mr. Bauer) involved in the remediation. As previously discussed in the Flake Opinion and the Holt/Armstrong Opinion, however, these facts alone are insufficient to impose liability on Alper. *See In re Alper Holdings*, 2008 WL 160203, at \*5-6; *In re Alper Holdings*, 2008 WL 541154, at \*3.

The fact that a parent company and its subsidiary share common employees is insufficient to impose liability on the part of the parent for acts of the subsidiary. *See United States v.*

*Bestfoods*, 524 U.S. 51, 69 (1998) (“[I]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.”) (internal quotations omitted). Courts generally presume overlapping directors are acting on behalf of the subsidiary and not the parent company when acting for the subsidiary absent extraordinary circumstances. *Bestfoods*, 524 U.S. at 69-71.

Despite the fact that the Esserman Firm is now attempting this argument for the third time, the Court remains unpersuaded. The Adkins Claimants have failed to provide any support either to rebut the legal presumption that Mr. Bauer was acting on behalf of Saltire and not Alper in overseeing the Dickson County remediation or to support their claim that Alper participated (negligently or otherwise) in the remediation. Accordingly, the Court sees no reason to part ways with the rationale set forth in the Flake and Holt/Armstrong Opinions. *See, e.g., In re Manhattan Invest. Fund Ltd.*, 343 B.R. 63, 67 (S.D.N.Y. 2006) (“The law of the case is a discretionary doctrine, providing ‘that where a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’” While the law of the case is “a discretionary doctrine which does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided,” nevertheless, the situations justifying reconsideration are generally limited to “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.”) (internal citations omitted); *641 Ave. of Americas Ltd. Partnership v. 641 Associates, Ltd.*, 189 B.R. 583, 588 (S.D.N.Y. 1995) (“[U]nder the law of the case doctrine, a decision on an issue of law becomes binding precedent in subsequent stages of the same litigation.”).

### **Alper Has No Indirect Liability to the Adkins Claimants**

Despite this Court's prior opinions, the Adkins Claimants argue in the alternative that Alper is indirectly liable to the Adkins Claimants on the basis that Saltire was an alter ego of Alper during the negligent remediation of the Dickson Plant. The Court does not see any benefit in revisiting this issue again except to draw the Adkins Claimants' attention to that portion of the Holt/Armstrong Opinion which states as follows:

While this Court previously did not address whether Saltire's alter ego claims were property of the estate, *see In re Alper Holdings*, 2008 WL 160203, at \* 6, it is clear based upon the conduct presently alleged that such alter ego claims were in fact property of Saltire's bankruptcy estate and, accordingly, that those alter ego claims were released under section 13.1 of the Saltire Plan. Accordingly, the Holt Claims are disallowed.

*In re Alper Holdings*, 2008 WL 541154, at \*4.

“Where a claim is generalized, with no particularized injury stemming from it and where the claim may be brought by any creditor, the trustee or debtor-in-possession is the appropriate party to assert the claim and creditors are subject to the outcome of the action brought by the trustee or debtor-in-possession.” *In re Enron Corp.*, 2003 WL 1889040, at \*4; *see also Murray v. Miner*, 876 F. Supp. 512, 516 (S.D.N.Y. 1995) (An alter ego claim “belongs to the trustee if (1) under governing state law the debtor could have asserted an alter ego claim to pierce its own corporate veil, and (2) plaintiffs’ claim is a general one, of the type that could be brought by any creditor of the debtor.”).

Despite their contentions, the injuries asserted by the Adkins Claimants are not particularized or unique and could have properly been brought by Saltire or Saltire's general body of creditors. Accordingly, Alper has no indirect liability to the Adkins Claimants on a theory of alter ego liability.

**28 U.S.C. §§ 157(b)(2) and (b)(5)**

Finally, the Adkins Claimants argue that the Debtor's Motion to Dismiss is an impermissible attempt to bypass Congress's command that personal injury claims be tried in the District Court. This argument is without merit.

Section 157(b)(2) of title 28 of the United States Code, which outlines a non-exhaustive laundry list of matter that fall within the category of "core" proceedings, specifically excludes from the definition of core the "liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution in a case under title 11." 11 U.S.C. § 157(b)(2). Section 157(b)(5) goes to say that "the district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending..." 11 U.S.C. § 157(b)(5). However, as previously stated on the record at the hearing denying the Adkins Claimants' application for a stay pending the determination of their motion before the District Court to withdraw the bankruptcy reference, this matter does not concern "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims" so as to implicate Section 157(b)(2)(B), but rather merely concerns the allowance or disallowance of timely filed proofs of claim as a matter of law. See Transcript from Hearing on Motion for Stay Pending Motion of the Personal Injury Claimants dated March 25, 2008, at pp. 25-26 (emphasis supplied).

Alper has objected to the Adkins Claims (as reformulated in the New Adkins Claims) as legally insufficient, and courts in this Circuit have repeatedly held that proceedings to determine the allowance or disallowance of claims are core matters. See *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1389 (2d Cir. 1990); *Enron Power Mktg., Inc. v. Nevada Power Co. (In re Enron Corp.)*, No. 03-09332, 2004 WL 3015256, at \*5 (S.D.N.Y. Dec. 28, 2004); *In re Chateaugay Corp.*, 111 B.R. 67, 76 (Bankr.



S.D.N.Y. 1990) (“the bankruptcy court must have jurisdiction to make the threshold determination of whether as a matter of law, a claim exists which can be asserted against the debtor, even if that claim sounds in personal injury or wrongful death”) (emphasis supplied).

Therefore, as this matter is clearly within this Court’s “core” jurisdiction, the Adkins Claimants’ argument that the Debtor is attempting to impermissibly side-step the District Court is without merit.

### **CONCLUSION**

For the reasons set forth above and for the reasons set forth in the Flake Opinion and the Holt/Armstrong Opinion, the Court finds that Alper cannot be held liable, directly or indirectly, for claims arising out of or relating to Saltire’s alleged contamination or remediation in Dickson County, Tennessee. Therefore, the Adkins Claims are disallowed and expunged.

IT IS SO ORDERED.

Dated: New York, New York  
April 3, 2008

/s/ Burton R. Lifland  
The Honorable Burton R. Lifland  
United States Bankruptcy Judge

**TAB 3**

## MANAGEMENT AGREEMENT

AGREEMENT, dated as of January 1, 1995 by and among Alper Holdings USA, Inc., a Delaware corporation ("Alper Holdings") and Saltire Realty Holdings, Inc. a Washington corporation ("Realty Holdings"), Saltire Realty, Inc., a Washington corporation ("Realty"), Saltire Industrial, Inc., a Delaware corporation ("Saltire Industrial"), First City Diversified Inc., a Delaware corporation ("Diversified"), Alper Development, Inc., a Delaware corporation ("Alper Development"), Alper Northwest, Inc., a Washington corporation ("Alper Northwest"), First City Capital Corporation, a New York corporation ("FCC") and Alper Securities, Inc., a Nevada corporation ("Alper Securities"); (Realty Holdings, Realty, Saltire Industrial, Diversified, Alper Development, Alper Northwest, FCC and Alper Securities sometimes are referred to collectively as the "Companies").

Whereas, the Companies require certain management, supervisory and advisory services; and

Whereas, Alper Holdings is in the business of providing such services; and

Whereas, the Companies are among numerous affiliated entities which require various types and levels of management, supervisory and advisory services, and the Companies acknowledge that such services can be provided more effectively and efficiently by Alper Holdings than if each such entity were to engage its own personnel and other elements necessary to receive the services required; and

Whereas, Alper Holdings and the affiliated entities to which such services are to be provided by Alper Holdings have attempted in good faith to determine the type and level of services required by each such entity and the various personnel and other elements of overhead of Alper Holdings necessary to deliver the aggregate level of services required by such entities; and

Whereas, Alper Holdings and the Companies hereby terminate their previous Management Agreement, dated as of November 30, 1992.

Now, therefore, the parties hereto agree as follows:

(1) Management. Each of the Companies hereby retains Alper Holdings to provide certain management, supervisory and advisory services to be agreed upon by Alper Holdings and each such Company. Such services may include, without limitation, the following:

- (a) Business - formulation and review of business plans in collaboration with line managers; periodic reviews of operations and results;

- (b) Personnel - advice on retention and dismissal of employees; review of staffing plans; design and administration of benefit plans;
- (c) Investment - analyses and selection of investment; management of investment; cash management;
- (d) Accounting - maintenance of books and records and preparation of all financial and statistical information (including financial statements), management reports and all other operating, accounting, and financial data reasonably necessary for management of the business; selection and retention of auditors and consultants; management of auditors and consultants;
- (e) Legal - supervision and provision of legal services, including, selection and retention of counsel for various matters; management of retained law firms;
- (f) Tax - tax planning; preparation of tax returns; conduct of tax audits; and
- (g) Environmental - supervision and management of various environmental matters, including risk assessment, risk management, technical assessment, remediation, legal and compliance.

(2) Direct Expenses. Each of the companies shall be responsible for all direct out of pocket expenses reasonably incurred by Alper Holdings in connection with the performance of its responsibilities to such Company hereunder (which shall include all services rendered to any direct or indirect subsidiaries of such Company which is not a signatory to this agreement), as well as any taxes and other transaction-related fees imposed. Each of the Companies hereby authorizes Alper Holdings to incur and pay for such reasonable expenses (including, without limitation, the retention of all lawyers, accountants and other advisors and professionals if not engaged by any Company) on behalf of such Company and such Company agrees promptly to reimburse Alper Holdings for any such expenses.

(3) Compensation.

- (a) As compensation for the services rendered pursuant to this Agreement for the period January 1, 1995 through December 31, 1995, each Company shall pay to Alper Holdings an aggregate annual fee to be agreed upon by Alper Holdings and such Company no later than January 31, 1995 equal to the product of (i) Alper Holdings' budgeted overhead and operating expenses for such period (the "Period Budget") and (ii) the quotient resulting

from a fraction of the numerator of which is (x) the portion of the Period Budget reasonably allocable to the management of each such Company based upon a review by each such Company and Alper Holdings of Alper Holdings' budgeted overhead and operating expenses and the nature and level of services anticipated to be required by each such Company, and the denominator of which is (y) the sum of the portions of the Period Budget allocable to Companies other than Alper Holdings. Such fee shall be paid in advance in four equal quarterly payments. The first payment shall be payable on or prior to January 31, 1995.

- (b) For each succeeding one year period for which this Agreement is renewed following the completion of the initial period, on or before the December 15 of the immediately preceding year Alper Holdings shall submit (i) a budget of Alper Holdings' anticipated overhead and operating expenses for the next calendar year, (ii) the portion of such budgeted overhead and expenses reasonably allocable to each of the Companies on the basis described in 3(a) above (the "Annual Fee") and (iii) the basis for such allocation. As compensation for the services rendered pursuant to this agreement for such calendar year, the Companies shall pay to Alper Holdings the Annual Fee in advance, no later than the first business day of the quarter, in four equal quarterly payments.
- (c) If the nature and level of services actually required by any Company differs materially from the anticipated nature and level of services indicated by such Company, such Company and Alper Holdings agree to modify the Annual Fee (or the fee payable for the year ending December 31, 1995) by an amount appropriate under the circumstances.

(4) Term. This agreement shall be effective until December 31, 1995 (the "Primary Term") and shall be automatically renewed each year for subsequent one year terms. Each of Alper Holdings and the Companies may terminate this agreement prior to the scheduled termination date by giving written notice of termination; provided however, upon a termination by any Company, such Company shall pay to Alper Holdings an amount equal to the unpaid portion of the management fee that would have been payable in respect of the remainder of the year in which the Agreement is terminated.

(5) Other Transaction by Alper Holdings; Conflicts. Until such time as this agreement is terminated pursuant to the immediately preceding section, Alper Holdings shall use its best efforts in connection with the management of the Companies and the employees of Alper Holdings shall devote such time and activity during business days and hours as is reasonably necessary for the management of the Companies. Alper Holdings shall be free to act as manager, management adviser, financial adviser, or consultant to any person or account, or to participate in

any other business, including those substantially similar to the business of the Companies. Alper Holdings and each of the Companies recognize and accept that they may have common directors, officers, employees, consultants, agents and advisors. Alper Holdings and each of the Companies hereby waive any consequent conflict of interest or breach of fiduciary responsibility, confidence or other duty against each other and against each of their officers, directors, employees, agents and representatives unless there is a final judicial determination that such entity or person did not act in a manner it or he reasonably believe to be in or not opposed to the best interest of such corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was lawful.

(6) Liability. Neither Alper Holdings nor any of its directors, officers, employees, agents or representatives shall be liable to any of the Companies and neither the Companies nor any of their respective directors, officers, employees, agents or representatives shall be liable to Alper Holdings for any action, omission, error of judgment or mistake of law except to the extent that there is a final judicial determination that (i) any of the foregoing results solely from willful misfeasance or gross negligence of the party seeking exculpation and (ii) the party seeking exculpation did not act in a manner he reasonably believed to be in or not opposed to the best interest of such other Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was lawful.

(7) Indemnification.

- (a) Each of the Companies hereby respectively agrees to indemnify and hold harmless Alper Holdings and its directors, officers, employees, agents and representatives (an "indemnified party") from any and all loss, damage, claim or liability ("Liability") of any nature (including, but not limited to, investigating, preparing or defending any litigation, commenced or threatened, or any claim whatsoever and the fees and expenses of counsel selected by such indemnified party and approved by the Companies (which approval shall not be withheld unreasonably)) arising out of services provided to such Company pursuant to this Agreement or the transactions contemplated hereby except to the extent that there is a final judicial determination that (i) such Liability results solely from the willful misfeasance or gross negligence of the indemnified party and (ii) the indemnified party did not act in good faith and in a manner it or he reasonably believed to be in or not opposed to the best interest of the Company to whom the services were provided and, with respect to any criminal action, had no reasonable cause to believe that the conduct of such party out of which such Liability arose, if any, was lawful. Each Company agrees to advance all costs and expenses for the indemnified party as incurred, subject to the agreement of the indemnified party to repay such advance upon a final determination that indemnification was not owed.

- (b) Alper Holdings hereby agrees to indemnify and hold harmless the Companies and their officers, directors, employees, agents and representatives (an "indemnified party") from any and all Liability of any nature (including, but not limited to, any and all expense whatsoever reasonably incurred in investigating, preparing or defending any litigation, commenced or threatened, or any claim whatsoever and the fees and expenses of counsel selected by such indemnified party and approved by Alper Holdings (which approval shall not be withheld unreasonably)) arising out of this agreement or the transactions contemplated hereby to the extent that there is a final judicial determination that (i) such Liability results solely from the willful misfeasance or gross negligence of Alper Holdings and (ii) Alper Holdings did not act in good faith and in a manner it reasonably believed to be in or not opposed to the best interest of the party seeking such indemnification and with respect to any criminal action, had no reasonable cause to believe that the conduct of such party out of which such Liability arose, if any, was lawful. Alper Holdings agrees to advance all costs and expenses of the indemnified party as incurred, subject to the agreement of the indemnified party to repay all such advances upon a final determination that indemnification was not owed.

(8) Amendment and Modification. This agreement may be modified or amended only by written agreement executed by Alper Holdings and the Companies.

(9) Successors and Assigns. Neither the Companies nor Alper Holdings shall assign or otherwise transfer any of its rights under this agreement without the written consent of the other party.

(10) Captions; Severability. Section titles contained in this agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this agreement or the intent of any provision hereof. Each provision of this agreement is severable. If any provision or term hereof is determined, for any reason whatsoever, to be illegal or otherwise unenforceable, (i) such provision shall be reformed and constructed in such a manner as to fulfill the intent of the parties hereto to the greatest possible extent and (ii) such determination shall not affect the validity of the remaining provisions and terms of this agreement.

(11) Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of New York without regard to the conflicts of law rules thereof.

(12) Counterparts; Effectiveness. This agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the



signatures thereto and hereto were upon the same instrument. This agreement shall become effective when each party hereto shall have received counterparts hereof signed by all of the other parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement, or caused this agreement to be executed by their respective authorized officers, as of the day first above written.

SALTIRE REALTY HOLDINGS, INC..

ALPER HOLDINGS USA, INC.

By: William L. L...

By: William L. L...

ALPER DEVELOPMENT, INC.

SALTIRE REALTY, INC.

By: \_\_\_\_\_

By: William L. L...

ALPER NORTHWEST, INC.

SALTIRE INDUSTRIAL, INC.

By: \_\_\_\_\_

By: William L. L...

FIRST CITY CAPITAL CORPORATION

FIRST CITY DIVERSIFIED INC.

By: William L. L...

By: William L. L...

ALPER SECURITIES, INC.

By: William L. L...



signatures thereto and hereto were upon the same instrument. This agreement shall become effective when each party hereto shall have received counterparts hereof signed by all of the other parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement, or caused this agreement to be executed by their respective authorized officers, as of the day first above written.

SALTIRE REALTY HOLDINGS, INC..

ALPER HOLDINGS USA, INC.

By: William L. L.

By: William L. L.

ALPER DEVELOPMENT, INC.

SALTIRE REALTY, INC.

By: \_\_\_\_\_

By: William L. L.

ALPER NORTHWEST, INC.

SALTIRE INDUSTRIAL, INC.

By: Kenneth V. Bellamy

Kenneth V. Bellamy, President

By: Dean R. Erickson

Dean R. Erickson, Secretary

FIRST CITY CAPITAL CORPORATION

FIRST CITY DIVERSIFIED INC.

By: William L. L.

By: William L. L.

ALPER SECURITIES, INC.

By: William L. L.

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FEB-6-95 MON 10:07 FIRST CITY CAPITAL

FEB- 6-95 MON 16 35 First City Capit

P.02

signatures thereto and hereto were upon the same instrument. This agreement shall become effective when each party hereto shall have received counterparts hereof signed by all of the other parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement, or caused this agreement to be executed by their respective authorized officers, as of the day first above written.

SALTIRE REALTY HOLDINGS, INC.

ALPER HOLDINGS USA, INC.

By: William L. L. By: William L. L.

ALPER DEVELOPMENT, INC.

SALTIRE REALTY, INC.

By: William L. L. By: William L. L.

ALPER NORTHWEST, INC.

SALTIRE INDUSTRIAL, INC.

By: William L. L. By: William L. L.

FIRST CITY CAPITAL CORPORATION

FIRST CITY DIVERSIFIED INC.

By: William L. L. By: William L. L.

ALPER SECURITIES, INC.

By: William L. L.

**TAB 4**

**Penalty for presenting fraudulent claim** Fine of up to \$500,000 or imprisonment for up to 5 years, or both 18 U.S.C. §§ 152 and 3571

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----  
ALPER HOLDINGS USA, INC ,

Debtor

Chapter 11

Case No 07-12148 (BRL)

vs

CHARLOTTE ARMSTRONG  
c/o Barrett Law Office, P A  
One Burton Hills Blvd , Suite 380  
Nashville, TN 37215

Creditor  
-----

**SUPPORTING DOCUMENT ATTACHMENT**

Creditor's property and personal damage claim arises from contamination by hazardous waste including Trichloroethylene ("TCE"), and industrial solvent used at a manufacturing facility in Dickson, Tennessee and is based on the independent acts and/or omissions of Alper Holdings USA, Inc in connection with said contamination

**POWER OF ATTORNEY**

A Power of Attorney authorizing Barrett Law Office P A to file this claim is attached hereto

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

---

ALPER HOLDINGS USA, INC ,

Debtor

Chapter 11

Case No 07-12148 (BRL)

vs

CHARLOTTE ARMSTRONG  
c/o Barrett Law Office, P A  
One Burton Hills Blvd , Suite 380  
Nashville, TN 37215

Creditor

---

**STATEMENT OF RELATED CLAIMS**

Filed simultaneously herewith are 18 other Proof of Claims arising out of contamination by hazardous waste including Trichloroethylene ("TCE"), an industrial solvent used at a manufacturing facility in Dickson, Tennessee and is based on the independent acts and/or omissions of Alper Holdings USA, Inc in connection with said contamination

## CONTRACT OF EMPLOYMENT BETWEEN ATTORNEY AND CLIENT

This agreement made this 17th day of September, 2003, by and between Jon Armstrong and wife, Charlotte Armstrong, client, and Henry F. Todd, Jr. and Lynn Agee, Attorneys at Law, is as follows:

The Client hereby retains and employs Todd & Agee, to bring suit upon and/or to otherwise represent them in the prosecution and recovery and settlement of their claim and cause of action against Schrader and others responsible for TCE for damages arising from certain personal injuries and/or property damage sustained by them through the negligence of that company and/or person on a continuing basis, in the State of Tennessee.

The Client agrees to pay Todd & Agee for services rendered pursuant to this contract of employment, a sum equal to [REDACTED] of the amount recovered in this case, whether such recovery be by way of settlement, compromise or judgment.

It is understood that Todd & Agee are not specialized in toxic tort and are authorized to seek with the client's approval additional counsel to pursue the claims of clients. Any additional counsel included will be paid from the [REDACTED] amount recovered in this case.

Further the parties acknowledge that the client has given Todd & Agee certain documents relevant to the claim and that these documents are attorney-client privileged only for Todd and Agee. Todd & Agee agrees to consult the clients prior to releasing said documents to other attorneys or representatives of the potential claimants.

Clients specifically understand that there may be defenses of potential defendants relating to alleged statute of limitations. Any fees forthcoming will be included in the [REDACTED] settlement fees.

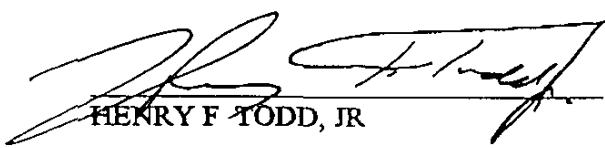
Clients and Todd & Agee agree to seek other counsel who will agree to pay necessary expenses for the prosecution of the claim.

It is understood and agreed that if no recovery is made that the Client will not owe said Todd & Agee or any other counsel hired by them any sum of money for services rendered in this case except for such expenses as court reporter's charges, cost of photographs, maps, etc. Any and all charges that the Armstrongs will be liable for will be approved by the Armstrongs prior to services being performed. It is understood and agreed that no final settlement of the Client's claim suit is to be made without the Client's permission and consent.

It is understood and agreed between the Client and Todd & Agee that in the case of settlement or no settlement that the clients will be required to pay or be responsible for payment of more than [REDACTED] of the settlement and approved by the clients for the above mentioned expenses after approval by the clients but the clients understand that expenses approved by the client may be in addition to the 40% attorneys fees.

  
CLIENT

  
CLIENT

  
HENRY F. TODD, JR.

  
LYNNE CLE





L A W F I R M, L. L. P.

MICHAEL HAMILTON, Esq  
ATTORNEY

ADMITTED TO PRACTICE IN TENNESSEE AND ARKANSAS

September 17, 2007

United States Bankruptcy Court  
Southern District of New York  
Alper Holdings USA, Inc Claims  
One Bowling Green  
New York, New York 10004-1408

Re Alper Holdings USA, Inc  
Chapter 11 Case No 07-12148(BRL)

Dear Sir/Madam

Enclosed for filing are Proofs of Claim on behalf of the following individuals

Charlotte Armstrong  
Jon Armstrong  
Donald, Kristi and Hunter Atkins  
Chad, Patricia and Emily Beard  
Eric and Peyton Christian and  
Jennifer Casteel  
Charity Comeaux and Joshua Campbell  
Timothy, Kimberly and Paxton DeLoach  
Anthony, Keysha and Autumn  
Fambrough  
Cathy Flake

Ray Flake  
Chanda Heflin, John Christopher and  
Sydney Stiver  
David, Jodie, Cassidy, Dawson and  
Mason Heimbach  
Scott, Darcie and Samuel Herkimer  
Steven, Melissa and Mya Jones  
Barry, Christie and Luke Piland  
Priscilla Fowler, Jason and James  
Stewart  
Travis, Amy and Lauren Wood

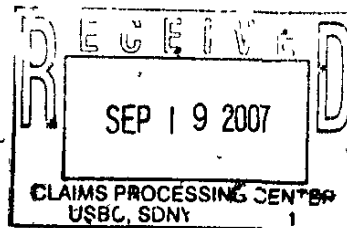
Thank you for your attention to this matter Please let us know if there are any questions

Sincerely

Michael Hamilton

MH lh

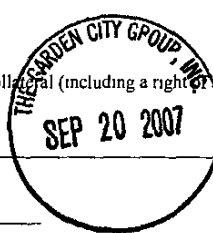
cc Patrick Barrett, Barrett Law Office, P A



One Burton Hills Boulevard, Suite 380 • Nashville, Tennessee 37215  
615-242 0199 • FAX 615 256-5922  
mhamilton@provostumphrey.com • www.provostumphrey.com

Beaumont, TX • Houston, TX • Dallas, TX • Tyler, TX • Nashville, TN • Memphis, TN • North Little Rock, AR

B 10 (Official Form 10) (04/07)

UNITED STATES BANKRUPTCY COURT <u>SOUTHERN</u> DISTRICT OF <u>NEW YORK</u>		PROOF OF CLAIM
Name of Debtor <b>ALPER HOLDINGS USA, INC</b>	Case Number <b>07-12148 (BRL)</b>	
NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503 <b>FILED - 00013</b>		
Name of Creditor (The person or other entity to whom the debtor owes money or property) <b>Armstrong, Jon</b>	<input checked="" type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copies of all such proofs of claim and particulars. <b>ALPER HOLDINGS USA, INC</b> <b>07-12148 (BRL)</b>	
Name and address where notices should be sent <b>Armstrong, Jon</b> <b>c/o Barrett Law Office, P A, One Burton Hills</b> <b>Blvd, Ste 380, Nashville, TN 37215</b> Telephone number <b>(615) 665-9990</b>		THIS SPACE IS FOR COURT USE ONLY
<input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court		
Last four digits of account or other number by which creditor identifies debtor		Check here <input type="checkbox"/> replaces if this claim <input type="checkbox"/> amends a previously filed claim, dated _____
<b>1 Basis for Claim</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input checked="" type="checkbox"/> Other <u>Property Damage</u>		
<input type="checkbox"/> Wages, salaries, and compensation (fill out below) Last four digits of your SS # _____ Unpaid compensation for services performed _____ From _____ to _____ (date) (date)		
<b>2. Date debt was incurred</b> <u>04/08/2004</u>		<b>3 If court judgment, date obtained.</b>
<b>4 Classification of Claim</b> Check the appropriate box or boxes that best describe your claim and state the amount of the claim at the time the case was filed. See reverse side for important explanations.		
<b>Unsecured Nonpriority Claim</b> \$ _____ <input type="checkbox"/> Check this box if a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or c) none or only part of your claim is entitled to priority		
<b>Unsecured Priority Claim</b> <input type="checkbox"/> Check this box if you have an unsecured claim, all or part of which is entitled to priority Amount entitled to priority \$ _____		
Specify the priority of the claim		<b>Secured Claim</b> <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff) Brief Description of Collateral <input type="checkbox"/> Real Estate <input type="checkbox"/> Other _____ <input type="checkbox"/> Motor Vehicle Value of Collateral \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any \$ _____
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B) <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950),* earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(5)		<input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____) *Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment
<b>5 Total Amount of Claim at Time Case Filed</b> \$ _____ (unsecured) <b>Contingent/</b> <b>Unliquidated/Disputed</b> <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal charges		unknown (total) Statement of all interest or additional
<b>6 Credits</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim		THIS SPACE IS FOR COURT USE ONLY
<b>7 Supporting Documents</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.		
<b>8 Date-Stamped Copy</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim		
Date <u>9/14/2007</u>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any) <u>Patrick Barrett, Attorney for Creditor</u>	

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both 18 U.S.C. §§ 152 and 3571

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

ALPER HOLDINGS USA, INC ,

Debtor

Chapter 11

Case No 07-12148 (BRL)

vs

JON ARMSTRONG  
c/o Barrett Law Office, P A  
One Burton Hills Blvd , Suite 380  
Nashville, TN 37215

Creditor

**STATEMENT OF RELATED CLAIMS**

Filed simultaneously herewith are 18 other Proof of Claims arising out of contamination by hazardous waste including Trichloroethylene ("TCE"), an industrial solvent used at a manufacturing facility in Dickson, Tennessee and is based on the independent acts and/or omissions of Alper Holdings USA, Inc. in connection with said contamination

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

ALPER HOLDINGS, USA, INC ,

Debtor

Chapter 11

Case No 07-12148 (BRL)

vs

JON ARMSTRONG  
c/o Barrett Law Office, P A  
One Burton Hills Blvd , Suite 380  
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Creditor

**SUPPORTING DOCUMENT ATTACHMENT**

Creditor's property and personal damage claim arises from contamination by hazardous waste including Trichloroethylene ("TCE"), and industrial solvent used at a manufacturing facility in Dickson, Tennessee and is based on the independent acts and/or omissions of Alper Holdings USA, Inc in connection with said contamination

**POWER OF ATTORNEY**

A Power of Attorney authorizing Barrett Law Office P A to file this claim is attached hereto

:

## CONTRACT OF EMPLOYMENT BETWEEN ATTORNEY AND CLIENT

This agreement made this 17th day of September, 2003, by and between Jon Armstrong and wife, Charlotte Armstrong, client, and Henry F. Todd, Jr. and Lynn Agee, Attorneys at Law, is as follows:

The Client hereby retains and employs Todd & Agee, to bring suit upon and/or to otherwise represent them in the prosecution and recovery and settlement of their claim and cause of action against Schrader and others responsible for TCE for damages arising from certain personal injuries and/or property damage sustained by them through the negligence of that company and/or person on a continuing basis, in the State of Tennessee.

The Client agrees to pay Todd & Agee for services rendered pursuant to this contract of employment, a sum equal to [REDACTED] of the amount recovered in this case, whether such recovery be by way of settlement, compromise or judgment.

It is understood that Todd & Agee are not specialized in toxic tort and are authorized to seek with the client's approval additional counsel to pursue the claims of clients. Any additional counsel included will be paid from the [REDACTED] amount recovered in this case.

Further the parties acknowledge that the client has given Todd & Agee certain documents relevant to the claim and that these documents are attorney-client privileged only for Todd and Agee. Todd & Agee agrees to consult the clients prior to releasing said documents to other attorneys or representatives of [REDACTED] potential claimants.

Clients specifically understand that there may be defenses of potential defendants relating to alleged statute of limitations. Any fees forthcoming will be included in the [REDACTED] settlement fees.

Clients and Todd & Agee agree to seek other counsel who will agree to pay necessary expenses for the prosecution of the claim.

It is understood and agreed that if no recovery is made that the Client will not owe said Todd & Agee or any other counsel hired by them any sum of money for services rendered in this case except for such expenses as court reporter's charges, cost of photographs, maps, etc. Any and all charges that the Armstrongs will be liable for will be approved by the Armstrongs prior to services being performed. It is understood and agreed that no final settlement of the Client's claim suit is to be made without the Client's permission and consent.

It is understood and agreed between the [REDACTED] and Todd & Agee that in the case of settlement or no settlement that the clients will be required to pay or be responsible for payment of more than [REDACTED] of the settlement [REDACTED] and approved by the clients for the above mentioned expenses after approval by the [REDACTED] but the clients understand that expenses approved by the client may be in addition to the 40% attorneys fees.

CLIENT

CLIENT

HENRY F. TODD, JR.

LYNN CLE

**TAB 5**





B 10 (Official Form 10) (12/07) – Cont.

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

*The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.*

**Items to be completed in Proof of Claim form****Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

**3a. Debtor May Have Scheduled Account As:**

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

**4. Secured Claim:**

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien

documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

**7. Documents:**

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). Do not send original documents, as attachments may be destroyed after scanning.

**Date and Signature:**

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

**DEFINITIONS****Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

**Claim**

A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. §506(a)**

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. §507(a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**INFORMATION****Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system ([www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

**EXHIBIT A**

**STATEMENT OF CLAIM  
FOR JON AND CHARLOTTE ARMSTRONG**

**A. The Armstrong Property has been contaminated by Trichloroethylene**

Jon and Charlotte Armstrong (the "Armstrongs") reside at property located at 125 Robinson Road, Dickson, Tennessee (the "Armstrong Property"). The Armstrongs have lived on the Armstrong Property since 1992. The Armstrongs have suffered damages due to the contamination of the soil and ground water of the Armstrong Property by trichloroethylene ("TCE").

**B. Alper's subsidiary caused environmental contamination in Dickson County Tennessee, polluting the soil and ground water with TCE, which contaminants migrated on to the Armstrong Property**

From approximately 1964 until March 1985, Saltire Industrial, Inc. ("Saltire"), a major industrial company, operated an industrial plant in Dickson, Tennessee (the "Dickson Plant"), producing automotive tire valves and associated products. Saltire used TCE at the Dickson Plant and dumped TCE-laden waste at various locations around Dickson County, Tennessee, including, but not limited to, the Dickson Plant site and a public landfill. Saltire's use of TCE at the Dickson Plant resulted in the contamination of the soil and ground water at and around the Dickson Plant site. The contamination of the Armstrong Property is the direct result of migration of TCE contaminants from one or more of these dump sites.

**C. Alper controlled the remediation of the Dickson County contamination**

*1. Alper controlled Saltire's activities in Dickson, Tennessee, after its 1992 acquisition of Saltire*

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In 1992, Alper and Saltire entered into a management agreement, dated as of November 30, 1992. On January 1, 1995, Alper and Saltire terminated their 1992 management agreement and entered into a new management agreement (the "Management Agreement"). Under the Management Agreement, Alper agreed to provide "*supervision and management of various environmental matters*, including risk assessment, risk management, technical assessment, *remediation*, legal and compliance" (emphasis added). The Management Agreement also immunized Alper from any litigation initiated by Saltire against Alper under the agreement. The combination of management powers ceded to Alper under the Management Agreement and Alper's immunity from suits by Saltire put Alper in a completely dominant position relative to Saltire with regard to the remediation in Dickson, Tennessee.

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of Saltire. *U.S. v. Kramer*, Civil Action No. 89-4340, 1998 U.S. Dist Lexis 14183, at \*\*14 (D. N.J. 1998). Also, Nicholas Bauer operated from an office in Virginia. Only Alper—not Saltire—was authorized to do business in the Commonwealth of Virginia.<sup>2</sup> Thus, when Bauer was engaged in remediation endeavors at the Dickson Plant, he was technically doing so as an official of Alper, not as an officer of Saltire; therefore, Alper's role predominated over that of Saltire with respect to environmental investigation and remediation in Dickson, Tennessee.

**D. Alper assumed a duty of care by controlling the remediation in Dickson, Tennessee, which it breached by conducting such remediation in a negligent manner**

Under the auspices of the Management Agreement or by merely exerting its control over its subsidiary, Alper controlled the remediation of the Dickson Plant contamination by placing an Alper employee in charge of the remediation. Alper is liable to plaintiffs under Restatement (Second) of Torts, Section 324A (1965), which has been accepted as law in Tennessee. The Restatement (Second) of Torts, Section 324A (1965) provides as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third party or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, *or*
- (b) he has undertaken to perform a duty owed by the other to the third person, *or*
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<sup>2</sup> The dates for which Alper was authorized to do business in the Commonwealth of Virginia closely parallel Nicholas Bauer's employment at Alper.

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Alper undertook to render environmental services on behalf of Saltire and manage Saltire's environmental affairs in general, including with respect to environmental matters in Dickson, Tennessee. Alper did recognize, or should have recognized, that this undertaking was necessary for the protection of third parties and/or the property of third parties. Alper failed to exercise reasonable care when carrying out this undertaking. Alper's failure to exercise reasonable care increased the risk of harm to the Armstrongs and their property by way of an environmental investigation and remediation that was improperly limited in geographical scope relative to the diverse expanse, varied locations and continuing migration of the subject TCE contaminant.

Because TCE is heavier than water, it tends to sink until it pools on an relatively impervious layer of rock. This is one reason it is such a persistent ground water contaminant and why it requires an extensive and appropriate sampling and remediation plan (e.g., deep sampling wells, long-term pumping, etc.). Alper did not follow an appropriate and extensive enough sampling or remediation plan.

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Alper knew or had reason to know that Saltire (then operating under the name of Scovill, Inc.) had improperly disposed of waste in multiple locations, including the Dickson Plant and the Dickson County landfill, in Dickson County, Tennessee.

Since Saltire had no employees and Alper was in the business of providing management services, the real nerve center of Saltire's remediation of the TCE contamination in Dickson, Tennessee was Alper—which, itself, acted directly on behalf of its subsidiary. Alper limited its investigation and remediation to the area of the Dickson Plant and a limited area around it. Alper failed to investigate alternative sources of TCE contamination. Alper knew, or had reason to know, that the geological characteristic of the Dickson area is a karst system susceptible to spreading contaminants through groundwater over a widely scattered area. Alper knew, or should have known, that improper disposal of TCE by Saltire in Dickson County led to the contamination of property in different areas of Dickson County and exposed residents therein to serious health risks.

Alper used inadequate equipment in its investigation of TCE, thus undermining remediation efforts. Alper failed to implement a remediation plan comprehensive enough in scope. Alper failed to determine the scope of remediation required to cure the contamination for which Saltire was responsible. Alper failed to remediate contamination on and around the Armstrong Property. Alper failed to take reasonable steps to determine the full scope of the contamination caused by Saltire and failed to take reasonable steps to prevent the unnecessary, preventable and continuing migration of the TCE contamination to surrounding properties such as the Armstrong Property.

**EXHIBIT B TO AMENDED PROOF OF CLAIM**

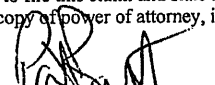
Charlotte Armstrong ("Claimant") reserves the right to amend and/or replace this Proof of Claim and to file further pleadings and documents from time to time (i) to restate liquidated and unliquidated components of the Claim, (ii) to update the total estimated exposure with respect to any unliquidated claims asserted herein, or (iii) for any other lawful reason should she deem it appropriate, including, without limitation, to claim all amounts due in respect of any prepetition or postpetition (1) professional fees and/or expenses (ii) charges and (iii) interest.

This Proof of Claim is filed under the compulsion of the bar date established in this Chapter 11 case and is filed to protect Claimant from forfeiture of claims by reason of said bar date. Filing of this Proof of Claim is not and shall not be deemed or construed as (a) an election of remedies, (b) a consent by Claimant to the jurisdiction of this Court or any other court with respect to proceedings, if any, commenced in any case against or otherwise involving Claimant, (c) a consent by Claimant to a jury trial in this Court or any other court in any proceeding as to any and all matters so triable herein or in any case, controversy or proceeding related hereto, pursuant to 28 U.S.C. § 157(e) or otherwise, (d) a waiver of the right of Claimant to a trial by jury in any proceeding so triable herein or in any case, controversy or proceeding related hereto, notwithstanding the designation or not of such matters as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2), and whether such jury trial is pursuant to statute or the United States Constitution, (e) a waiver of the right of Claimant to have final orders in non-core matters entered only after *de novo* review by a District Court judgment, (f) a waiver of the right of Claimant to have the reference withdrawn by the District Court in any matter subject to mandatory or discretionary withdrawal, (g) a waiver or limitation of any rights of Claimant, including, without limitation, a waiver of rights, claims, actions, defenses, setoffs or recoupments to which Claimant is or may be entitled under agreements, in law or in equity, all of which rights, claims, actions, defenses, set-offs and recoupments are expressly reserved by Claimant, or (h) an admission by Claimant that any property held by Debtor (or any debtor affiliate) is property of the estate.

In executing and filing this Proof of Claim, Claimant does not waive any other right or rights of action that she has or may have against the Debtor or any other person, including without limitation, rights against guarantors, officers or directors.



B 10 (Official Form 10) (12/07)

<b>UNITED STATES BANKRUPTCY COURT</b> Southern District of New York		<b>PROOF OF CLAIM</b>
Name of Debtor: <b>ALPER HOLDINGS USA, INC.</b>		Case Number: <b>07-12148 (BRL)</b>
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): <b>Armstrong, Jon</b>		<input checked="" type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.  <b>Court Claim Number: 00013</b> <i>(If known)</i>  <b>Filed on: 09/19/2007</b>
Name and address where notices should be sent:  <b>Armstrong, Jon</b> <b>c/o Barrett Law Office, PA, One Burton Hills Blvd., Ste 380, Nashville, TN 37215</b>  Telephone number: <b>(615) 665-9990</b>		
Name and address where payment should be sent (if different from above):  Telephone number:		<input checked="" type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.  <input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
<b>1. Amount of Claim as of Date Case Filed:</b> <u>\$Contingent/Unliquidated/Disputed</u>  If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.  If all or part of your claim is entitled to priority, complete item 5.  <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		<b>5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.</b>  Specify the priority of the claim.  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).  <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).  <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).  <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).  <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).  <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____).  <b>Amount entitled to priority:</b> \$ _____  <i>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>
<b>2. Basis for Claim:</b> <u>Property Damage</u> (See instruction #2 on reverse side.)		
<b>3. Last four digits of any number by which creditor identifies debtor:</b> _____  <b>3a. Debtor may have scheduled account as:</b> _____ (See instruction #3a on reverse side.)		
<b>4. Secured Claim</b> (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.  <b>Nature of property or right of setoff:</b> <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <b>Describe:</b>  <b>Value of Property:</b> \$ _____ <b>Annual Interest Rate</b> %  <b>Amount of arrearage and other charges as of time case filed included in secured claim,</b>  <b>if any:</b> \$ _____ <b>Basis for perfection:</b> _____  <b>Amount of Secured Claim:</b> \$ _____ <b>Amount Unsecured:</b> \$ _____		
<b>6. Credits:</b> The amount of all payments on this claim has been credited for the purpose of making this proof of claim.  <b>7. Documents:</b> Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See definition of "redacted" on reverse side.)  DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.  If the documents are not available, please explain:		
<b>Date:</b> <b>02/06/2008</b>  <b>Signature:</b> The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.   <b>Patrick Barrett, Attorney for Creditor</b>		<b>FOR COURT USE ONLY</b>

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

B 10 (Official Form 10) (12/07) – Cont.

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

*The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.*

**Items to be completed in Proof of Claim form****Court, Name of Debtor, and Case Number:**

Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

**3a. Debtor May Have Scheduled Account As:**

Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

**4. Secured Claim:**

Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien

documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**

If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

**7. Documents:**

Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). Do not send original documents, as attachments may be destroyed after scanning.

**Date and Signature:**

The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

**DEFINITIONS****Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

**Claim**

A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

**Secured Claim Under 11 U.S.C. §506(a)**

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car.

A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. §507(a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social-security, individual's tax-identification, or financial-account number, all but the initials of a minor's name and only the year of any person's date of birth.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**INFORMATION****Acknowledgment of Filing of Claim**

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system ([www.pacer.psc.uscourts.gov](http://www.pacer.psc.uscourts.gov)) for a small fee to view your filed proof of claim.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

**EXHIBIT A**

**STATEMENT OF CLAIM  
FOR JON AND CHARLOTTE ARMSTRONG**

**A. The Armstrong Property has been contaminated by Trichloroethylene**

Jon and Charlotte Armstrong (the "Armstrongs") reside at property located at 125 Robinson Road, Dickson, Tennessee (the "Armstrong Property"). The Armstrongs have lived on the Armstrong Property since 1992. The Armstrongs have suffered damages due to the contamination of the soil and ground water of the Armstrong Property by trichloroethylene ("TCE").

**B. Alper's subsidiary caused environmental contamination in Dickson County Tennessee, polluting the soil and ground water with TCE, which contaminants migrated on to the Armstrong Property**

From approximately 1964 until March 1985, Saltire Industrial, Inc. ("Saltire"), a major industrial company, operated an industrial plant in Dickson, Tennessee (the "Dickson Plant"), producing automotive tire valves and associated products. Saltire used TCE at the Dickson Plant and dumped TCE-laden waste at various locations around Dickson County, Tennessee, including, but not limited to, the Dickson Plant site and a public landfill. Saltire's use of TCE at the Dickson Plant resulted in the contamination of the soil and ground water at and around the Dickson Plant site. The contamination of the Armstrong Property is the direct result of migration of TCE contaminants from one or more of these dump sites.

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In 1992, Alper and Saltire entered into a management agreement, dated as of November 30, 1992. On January 1, 1995, Alper and Saltire terminated their 1992 management agreement and entered into a new management agreement (the "Management Agreement"). Under the Management Agreement, Alper agreed to provide "*supervision and management of various environmental matters*, including risk assessment, risk management, technical assessment, *remediation*, legal and compliance" (emphasis added). The Management Agreement also immunized Alper from any litigation initiated by Saltire against Alper under the agreement. The combination of management powers ceded to Alper under the Management Agreement and Alper's immunity from suits by Saltire put Alper in a completely dominant position relative to Saltire with regard to the remediation in Dickson, Tennessee.

Furthermore, under the Management Agreement, Saltire's finances and environmental affairs were managed and controlled by Alper. By controlling both

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These problems were compounded by the nature of the local geology. Unlike many areas which are underlain with relatively homogeneous layers of rock with consistent permeability, the Dickson area was known a "karst" zone. Karst geology has significant subsurface water flow in eroded limestone conduits (think of small to large caves). This results in a very heterogeneous flow of water underground. Water can flow in great amounts and in great distances. A well sunk in one location can test relatively clean while one just a short distance away can test positive for contaminants. Similarly, wells close to the source may be cleaner than ones farther away.

Alper knew or had reason to know that Saltire (then operating under the name of Scovill, Inc.) had improperly disposed of waste in multiple locations, including the Dickson Plant and the Dickson County landfill, in Dickson County, Tennessee.

Since Saltire had no employees and Alper was in the business of providing management services, the real nerve center of Saltire's remediation of the TCE contamination in Dickson, Tennessee was Alper—which, itself, acted directly on behalf of its subsidiary. Alper limited its investigation and remediation to the area of the Dickson Plant and a limited area around it. Alper failed to investigate alternative sources of TCE contamination. Alper knew, or had reason to know, that the geological characteristic of the Dickson area is a karst system susceptible to spreading contaminants through groundwater over a widely scattered area. Alper knew, or should have known, that improper disposal of TCE by Saltire in Dickson County led to the contamination of property in different areas of Dickson County and exposed residents therein to serious health risks.

Alper used inadequate equipment in its investigation of TCE, thus undermining remediation efforts. Alper failed to implement a remediation plan comprehensive enough in scope. Alper failed to determine the scope of remediation required to cure the contamination for which Saltire was responsible. Alper failed to remediate contamination on and around the Armstrong Property. Alper failed to take reasonable steps to determine the full scope of the contamination caused by Saltire and failed to take reasonable steps to prevent the unnecessary, preventable and continuing migration of the TCE contamination to surrounding properties such as the Armstrong Property.



**EXHIBIT B TO AMENDED PROOF OF CLAIM**

Jon Armstrong ("Claimant") reserves the right to amend and/or replace this Proof of Claim and to file further pleadings and documents from time to time (i) to restate liquidated and unliquidated components of the Claim, (ii) to update the total estimated exposure with respect to any unliquidated claims asserted herein, or (iii) for any other lawful reason should she deem it appropriate, including, without limitation, to claim all amounts due in respect of any prepetition or postpetition (1) professional fees and/or expenses (ii) charges and (iii) interest.

This Proof of Claim is filed under the compulsion of the bar date established in this Chapter 11 case and is filed to protect Claimant from forfeiture of claims by reason of said bar date. Filing of this Proof of Claim is not and shall not be deemed or construed as (a) an election of remedies, (b) a consent by Claimant to the jurisdiction of this Court or any other court with respect to proceedings, if any, commenced in any case against or otherwise involving Claimant, (c) a consent by Claimant to a jury trial in this Court or any other court in any proceeding as to any and all matters so triable herein or in any case, controversy or proceeding related hereto, pursuant to 28 U.S.C. § 157(e) or otherwise, (d) a waiver of the right of Claimant to a trial by jury in any proceeding so triable herein or in any case, controversy or proceeding related hereto, notwithstanding the designation or not of such matters as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2), and whether such jury trial is pursuant to statute or the United States Constitution, (e) a waiver of the right of Claimant to have final orders in non-core matters entered only after *de novo* review by a District Court judgment, (f) a waiver of the right of Claimant to have the reference withdrawn by the District Court in any matter subject to mandatory or discretionary withdrawal, (g) a waiver or limitation of any rights of Claimant, including, without limitation, a waiver of rights, claims, actions, defenses, setoffs or recoupments to which Claimant is or may be entitled under agreements, in law or in equity, all of which rights, claims, actions, defenses, set-offs and recoupments are expressly reserved by Claimant, or (h) an admission by Claimant that any property held by Debtor (or any debtor affiliate) is property of the estate.

In executing and filing this Proof of Claim, Claimant does not waive any other right or rights of action that she has or may have against the Debtor or any other person, including without limitation, rights against guarantors, officers or directors.

**TAB 6**

Bertellotti

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2 IN THE CIRCUIT COURT FOR THE TWENTY-THIRD  
3 JUDICIAL DISTRICT  
4 DICKSON COUNTY, TENNESSEE  
5 Case No. 383

6 -----  
7 ONA M. NORMAN, widow of GEORGE  
8 HAROLD NORMAN, Deceased; et al,  
9 Plaintiffs,

10 vs.  
11 SCOVILL, INC., (n/k/a) Saltire  
12 Industrial, Inc.; ALPER  
13 HOLDINGS USA, INC., and THE  
14 INDUSTRIAL DEVELOPMENT BOARD  
15 OF THE COUNTY OF DICKSON,  
16 TENNESSEE,

Defendants.

17 -----  
18 DEPOSITION OF  
19 ROBERT BERTELLOTTI  
20 NEW YORK, NEW YORK  
21 OCTOBER 22, 2003

22 ATKINSON-BAKER, INC.  
23 1-800-288-3376  
24 E-mail: www.depo.com

25 REPORTER: S. ARIELLE SANTOS, CSR.  
FILE NO. 9D0885E

0002

1  
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3 JUDICIAL DISTRICT  
4 DICKSON COUNTY, TENNESSEE  
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13 HOLDINGS USA, INC., and THE  
14 INDUSTRIAL DEVELOPMENT BOARD  
15 OF THE COUNTY OF DICKSON,  
16 TENNESSEE,

Defendants.

Bertellotti

-----  
Testimony of ROBERT BERTELLOTTI, taken  
on behalf of the Plaintiffs, at ANGEL &  
FRANKEL, PC, 460 Park Avenue, New York,  
New York, taken on Wednesday, October 22,  
2003, commencing at 9:00 in the morning.

A P P E A R A N C E S:  
FOR THE PLAINTIFFS:

BY - MICHAEL G. STEWART, ESQ.  
WALLER LANSDEN DORTCH & DAVIS  
Nashville City Center  
511 Union Street, Suite 2100  
P.O. Box 198966  
Nashville, Tennessee 37219-8966  
1-615-850-8856

FOR THE DEFENDANTS:

BY - TOM SCOTT, ESQ.  
BALL & SCOTT  
550 West Main Street, Suite 750  
Knoxville, Tennessee 37902  
1-865-525-7028

BY - JOHN A. LUCAS, ESQ.  
HUNTON & WILLIAMS, LLC  
900 South Gay Street, Suite 2000  
Knoxville, Tennessee 37902  
1-865-549-7750

A P P E A R A N C E S (Cont.):

BY - LAURENCE MAY, ESQ.  
ANGEL & FRANKEL  
460 Park Avenue  
New York, New York 10022

ALSO PRESENT:  
John Cohl in  
Wayne R. Smith

Bertellotti

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WITNESS - ROBERT BERTELLOTTI

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EXAMINATION

PAGE

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BY: MR. STEWART

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NUMBER DESCRIPTION

PAGE

4

1 Notice to Take Deposition

23

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2 Affidavit

47

6

3 10-9-03 Ball & Scott Letter

48

7

4 Affidavit

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8

5 Certificate of Incorporation

51

9

6 Interest & Fees Document

51

10

7 Management Agreement

117

11

8 Independent Auditors Report

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9 The Associated Press

153

13

10 Chattanooga Times

153

14

11 The Associated Press

153

15

12 The Tennessean

153

16

13 Defendants' Reply

196

17

14 Plaintiffs' Notebook

241

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(EXHIBITS ATTACHED)

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ROBERT BERTELLOTTI

2

c/o Alper Holdings USA, Inc.

3

800 Third Avenue

4

New York, New York 10022

5

Having been duly sworn,

6

Testifies as follows:

7

Bertellotti

EXAMINATION

BY MR. STEWART:

Q. State your name.

A. Robert Bertellotti.

Q. Mr. Bertellotti, what do you do for a living?

A. I am the president of Alper Holdings and also the president of Saltire Industrial. In general, I am a corporate executive.

Q. How long have you been president of Alper?

A. I have been -- the specific title "president" of Alper, probably since 2000. I have been a senior officer of Alper since approximately mid-year 1997. Title before was managing director, but I have

been the senior officer of Alper since approximately July of 1997.

Q. During the time you were managing director, did Alper have a president?

A. No, it did not.

Q. Did you perform all the roles of a president?

A. Yes. That's why it was the senior officer position for corporate.

Q. What did you do before that?

A. Prior to 1997, I was simply an employee of Alper Holdings.

Q. And in what capacity?

A. I was essentially a financial advisor, do financial advisory work.

Q. How long were you in that position?

A. I joined -- since the time I joined Alper, which was September of 1993.

Q. What did you do before that?

A. I worked for Nomura Securities International in corporate finance/investment banking, if you want to call it that.

Q. How long did you work for Nomura?

A. Approximately four years.

Q. Starting when?

A. 1989.

Q. Why did you leave?

A. I just decided to leave and took a sabbatical and moved to Europe.

Q. How long were you in Europe?

A. Approximately seven months.

Q. When was that sabbatical? What date?

A. It was in 1992. Began summer of 1992.

Q. And before Nomura, where did you work?

A. I was with Security Pacific National Bank, which is now Bank of America.

Bertellotti

19 Q. Was Nomura -- was that work in New  
20 York?

21 A. Yes, I did work in New York City.

22 Q. Okay. How about Security Pacific?

23 A. That was in Los Angeles.

24 Q. How long did you work at Security  
25 Pacific?

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2 A. Probably five years. I would have  
3 to look at a calendar. Four to five  
4 years, probably closer to five years.

5 Q. When did you start working there?

6 A. Approximately 1985.

7 Q. Why did you leave?

8 A. To join Nomura Security.

9 Q. What did you do prior to working at  
10 Security Pacific?

11 A. I worked for IBM Corporation.

12 Q. Now you look pretty young.

13 A. You can ask me how long I am. You  
14 look very young, as well.

15 Q. Okay, how long did you work at IBM?

16 A. Approximately three years.

17 Q. Starting when?

18 A. When I graduated from college in  
19 1981.

20 Q. Where did you go to college?

21 A. University of California.

22 Q. What was your degree?

23 A. I have a Bachelor of Science in  
24 biology with an emphasis in biochemistry.

25 Q. Do you have any other formal

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2 education?

3 A. No.

4 Q. Have you ever been arrested?

5 A. I have not.

6 Q. Have you ever -- I take it you  
7 haven't been convicted of a crime?

8 A. No.

9 Q. Have you ever been investigated by  
10 any sort of administrative authority?

11 A. No.

12 Q. Ever been investigated by the SEC?

13 A. No.

14 Q. Have you ever been deposed?

15 A. Yes, once.

16 Q. In what case?

17 A. I wouldn't recall the case  
18 specifically, but it was in relation to  
19 Saltire subsidiary Alper Development, Inc.  
20 We were not defendants. I was called, I  
21 don't remember the term, some type of  
22 third party witness. There was a Saudi  
23 Prince suing some advisor and they called  
24 us as a third party witness.

25 Q. When was that deposition, would

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2 have been taken?

3 A. I don't recall specifically.

Bertellotti

4 Approximately four years ago.

5 Q. So, 1999 time frame?

6 A. Approximately.

7 Q. What was the outcome of that  
8 lawsuit?

9 A. I have no idea; we never heard  
10 anything.

11 Q. Who were the attorneys representing  
12 Alper Development?

13 A. I was represented when I went in by  
14 Pircher, Nichols & Meeks of Los Angeles.

15 Q. What actual attorney?

16 A. I believe it was a gentleman named  
17 Michael Burke.

18 Q. How about Alper Development?

19 MR. SCOTT: Object to the  
20 form of the question.

21 THE WITNESS: Alper  
22 Development was not a defendant.

23 BY MR. STEWART:

24 Q. Okay. Explain that.

25 MR. SCOTT: What is the  
0013

1  
2 question?

3 MR. STEWART: I said, how  
4 about Alper DevelopmentMR. SCOTT:  
5 What about it?

6 THE WITNESS: Who was  
7 representing them?

8 BY MR. STEWART:

9 Q. Yes.

10 A. I believe Michael Burke and  
11 Pircher, Nichols & Meeks.

12 Q. So was Alper Development a  
13 defendant in that lawsuit?

14 A. No.

15 Q. Who was the defendant, do you know?

16 A. I don't know. It was a -- yes, I  
17 believe the name was Joseph Trimarki and I  
18 am not absolutely certain about that, but  
19 I probably, within 9 out of 10  
20 probability, I think it was Joseph

21 Trimarki evidently some type of financial  
22 advisor to a Saudi Prince and I don't know  
23 the name of the Saudi Prince.

24 Q. Have you ever testified in court?

25 A. I have not.  
0014

1  
2 Q. Have you ever testified in an  
3 administrative proceeding?

4 A. I have not.

5 Q. Have you ever been fired from a  
6 job?

7 A. I have not.

8 Q. Do you recognize that person  
9 sitting there in the blue shirt?

10 A. Yes, I do.

11 Q. Who is that?

12 A. John Coghlin.

13 Q. How do you know John Coghlin?

14 A. John Coghlin is a former colleague



Bertellotti

15 of mine.

16 Q. Former colleague where?

17 A. At Alper Holdings.

18 Q. And what did John Coghlin do at  
19 Alper Holdings?

20 A. He was the general counsel or  
21 assistant general counsel, depending what  
22 year you are speaking of.

23 Q. When was he general counsel?

24 A. Either position or specifically the  
25 general counsel position?

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2 Q. The general counsel.

3 A. Again, without referring to the  
4 corporate records I couldn't tell you  
5 specifically. Would you like me to  
6 estimate?

7 Q. I would like to you give me your  
8 best estimate, yes.

9 A. Would say, approximately, between  
10 1996 and 1998.

11 Q. And when was John Coghlin the  
12 assistant general counsel?

13 A. Approximately, from 1994 to 1996.

14 Q. When he was assistant general  
15 counsel or, who was the general counsel?

16 A. Gentleman named Scott Robbins.

17 Q. So he worked with Scott Robbins?

18 A. Yes. Scott Robbins, I assume, was  
19 his boss, was the general counsel. John  
20 was the assistant counsel.

21 Q. Was Scott Robbins the general  
22 counsel of Alper?

23 A. For a period of time, I believe so.

24 Q. Do you know when he was general  
25 counsel of Alper?

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2 A. I wouldn't know specifically,  
3 without referring to the corporate  
4 records.

5 Q. Why don't you give me your best  
6 understanding?

7 A. Well, I joined the company in 1993  
8 and again, not knowing precisely which  
9 titles and roles Mr. Robbins held, I would  
10 assume or guess that he was the general  
11 counsel. Certainly from the time I  
12 arrived in 1993 to approximately 1995 or  
13 1996, when John Coghlin became the general  
14 counsel.

15 Q. When was the last time you talked  
16 to Scott Robbins?

17 A. I have not spoken to Scott Robbins  
18 in seven or eight years, since the time he  
19 left the company, that might have been.

20 Q. Do you know if anybody at the  
21 company, including any of the company's  
22 agents or attorneys, have talked to Scott  
23 Robbins any time recently?

24 A. I have no idea.

25 Q. You have no knowledge?

Bertellotti

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A. I have no knowledge.  
Q. When was the last time you spoke to John Coghlin?

A. I said hello to him this morning.

Q. Have you spoken to him prior to that about this deposition?

A. Speak to -- John Coghlin is currently consultant to Alper Holdings and we have spoken regarding this litigation in general.

Q. What is he a consultant on?

A. For a variety of matters. He worked for the company for several years. He is very familiar with our operations, the corporate history.

Q. Why did Scott Robbins leave the company?

A. I don't know specifically. I wasn't an officer at the time. I wasn't involved in hiring, personnel decisions, compensation decisions at that time.

Q. Do you know whether he was terminated or whether he left voluntarily?

A. I suspect he left voluntarily. He

was a very capable individual who was in good standing, to my knowledge.

Q. What specific subjects did you talk about with John Coghlin regarding this deposition?

MR. SCOTT: I will instruct him not to answer that on the grounds of attorney-client privilege.

MR. STEWART: Counsel --

MR. SCOTT: He's not going to answer.

MR. STEWART: Maybe you need to state your privilege, because I am asking him.

MR. SCOTT: I just did.

MR. STEWART: No, you didn't. I am asking him what conversations he had with --

MR. SCOTT: With John Coghlin. I told him not to answer on the grounds of attorney-client privilege.

MR. STEWART: You need to

state the basis of your privilege.

MR. SCOTT: I just did.

MR. STEWART: No, you didn't. The attorney-client privilege covers discussions between a client and his counsel.

MR. SCOTT: That is -- I understand that. John Coghlin in

11 Bertellotti  
12 these discussions was acting as a  
13 consultant of one of the counsel  
14 to Alper Holdings, so I assert  
15 the attorney-client privilege.

16 MR. STEWART: The reason  
17 you are asserting the privilege?

18 MR. SCOTT: I am not going  
19 to argue with you. I am not  
20 going to say one more word. I  
21 instruct him not to answer. If  
22 you wish to continue speaking you  
23 may, but I am not.

24 MR. STEWART: Well, Counsel,  
25 I actually thank you for that  
0020 explanation because it's exactly

1 what I wanted.

2  
3 As you know, typically the  
4 attorney-client privilege only  
5 applies to statements made to an  
6 attorney, okay, representing a  
7 client. Your witness did not  
8 indicate Mr. Coghlin was  
9 representing him at the time that  
10 he had these conversations.

11 MR. LUCAS: I incorporate  
12 on my client Mr. Scott's  
13 objection and add that the  
14 question also attempts to invade  
15 items protected by the work  
16 product doctrine.

17 BY MR. STEWART:

18 Q. Now, in your conversations with  
19 Mr. Coghlin, did you have any  
20 conversations with him about this  
21 deposition in which Mr. Scott was not  
22 present?

23 A. No, I did not.

24 Q. I think we need to invoke the rule.  
25 I think Mr. Coghlin has to leave. He is

0021  
1 obviously a witness to deposition.

2 MR. SCOTT: Depositions are  
3 public.

4 MR. STEWART: Depositions  
5 are open just like the courtroom  
6 proceedings are open, and you can  
7 invoke the rule in depositions.  
8 You can --

9 MR. SCOTT: He's not going  
10 to leave.

11 MR. LUCAS: What rule are  
12 you invoking?

13 MR. STEWART: I am invoking  
14 the rule I can ask the witnesses  
15 to leave the court so they can  
16 testify. I know that can be  
17 applied in depositions, as well.

18 MR. SCOTT: The rule  
19 requires sequestration of  
20 witnesses; does not apply to  
21

22 Bertellotti  
 23 discovery depositions. He's  
 24 here, he is not going to leave.  
 25 You can go on with your  
 0022 deposition or whatever you want  
 1  
 2 to do, but he's not going to  
 3 leave.  
 4 MR. STEWART: I just state  
 5 for the record, however, if you  
 6 attempt to use him as a witness  
 7 we will move to strike his  
 8 testimony.  
 9 MR. SCOTT: You can move to  
 10 do whatever you like but he is  
 11 here, he is going to stay here,  
 12 and I suggest you go on with the  
 13 deposition and we ought to get to  
 14 the issues.  
 15 MR. STEWART: Mr. Scott,  
 16 don't worry. We will get to the  
 17 issues.  
 18 MR. SCOTT: I think you are  
 19 here to tell us the veracity  
 20 of --  
 21 MR. STEWART: I am here to  
 22 take a deposition, Mr. Scott, and  
 23 I will take the deposition as I  
 24 want to.  
 25 MR. SCOTT: Correct.

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 1  
 2 MR. STEWART: You brought a  
 3 witness to this deposition. I  
 4 have raised the issue. You have  
 5 chosen not to have him leave; you  
 6 can bear the consequences of that  
 7 decision.  
 8 MR. LUCAS: Two things:  
 9 Try not to talk over him because  
 10 it makes it difficult for the  
 11 court reporter to take it down,  
 12 and let's get on with the  
 13 deposition about the  
 14 jurisdictional issues. We are  
 15 wasting time.  
 16 MR. STEWART: Are you  
 17 having any difficulty taking down  
 18 his testimony so far?  
 19 (Whereupon Exhibit 1 is  
 20 Marked.)  
 21 BY MR. STEWART:  
 22 Q. I have handed you a document; do  
 23 you recognize it?  
 24 A. Yes.  
 25 Q. Do you see it's marked Exhibit 1?

0024  
 1  
 2 A. Yes, I do.  
 3 Q. What is it?  
 4 A. It's a Notice to Take Deposition  
 5 Duces Tecum.  
 6 Q. Have you seen this document before?

Bertellotti

7 A. Yes, I have.  
8 Q. Now, I would like you to turn to  
9 the second page. Do you see a list of  
10 documents?  
11 A. Yes, I do.  
12 Q. Now, have you brought me a plan of  
13 reorganization?

14 MR. SCOTT: Let me answer.  
15 He's not brought any of these  
16 documents to the deposition, and  
17 this is an improper notice. Mr.  
18 Bertellotti is not a party. And  
19 this document is ineffective to  
20 require him to do anything. He  
21 is here as a witness. You  
22 noticed us to take his deposition  
23 and he has not brought any  
24 documents. He didn't have to  
25 bring any documents, and he ain't

0025  
1 going to produce any documents.  
2 So with that said, I think that's  
3 the position that you are going  
4 to have to live with. You can  
5 ask him for the next two hours  
6 each one of these nine things,  
7 but I will stipulate he did not,  
8 will not, and is not in  
9 accordance with this notice  
10 producing these documents.

11 BY MR. STEWART:

12 Q. Mr. Bertellotti, where would I find  
13 the plan of reorganization that is  
14 referred to in Exhibit 1?

15 A. I would assume you can find it with  
16 the Federal Bank of New York, Federal  
17 Bankruptcy Court. I assume it's a matter  
18 of public record.

19 Q. Would the copy exist at Alper  
20 Holdings?

21 A. Yes.

22 Q. Can you give me the address of  
23 those officers?

24 A. 800 Third Avenue.  
0026

1 Q. 800 Third Avenue, where?  
2 A. In New York City.

3 Q. And where are we sitting right now,  
4 as we speak?

5 A. Sitting at 460 Park Avenue.

6 Q. Okay. Are both of these addresses  
7 on Manhattan in New York?

8 A. Yes, they are.

9 Q. How many minutes would you take  
10 from -- take ride one cab to the other?

11 MR. SCOTT: You are wasting  
12 time.

13 MR. STEWART: Mr. Scott,  
14 your objections are totally --  
15 speaking objections are totally  
16 prohi bi ted.  
17

Bertellotti

18 MR. SCOTT: No, not.  
19 MR. STEWART: I am taking  
20 the deposition. Your witness has  
21 shown up here without any of the  
22 requested documents. You made no  
23 effort to verify this.  
24 MR. SCOTT: You need to  
25 read Rule 26 and 34.

0027

1  
2 MR. STEWART: You know, we  
3 have had plenty of time to get  
4 these documents and come right  
5 back up here to New York. Not a  
6 problem. I am trying to find out  
7 where they are.

8 BY MR. STEWART:  
9 Q. Tell me, now, where would I find a  
10 disclosure statement?

11 Do you have that at your office?  
12 A. I would assume so. I believe  
13 there's an entire set. I believe there's  
14 an entire set.

15 Q. At your offices?

16 A. Yes.

17 Q. When I say your offices, being we  
18 agree, I am talking the offices of Alper  
19 Holdings USA here in New York.

20 A. Agreed.

21 Q. How about the stock purchase  
22 agreement schedules and disclosures  
23 described in Paragraph 2 of this notice?

24 A. I am not aware of any stock  
25 purchase agreement. There is no such

0028

1  
2 thing, to my knowledge.

3 Q. No such thing with regard to Alper  
4 exchange of debt for 55 percent of the  
5 common stock of First City?

6 MR. SCOTT: Object to the  
7 form of the --

8 MR. LUCAS: Object to the  
9 form of the question. It's not  
10 what you asked him.

11 BY MR. STEWART:

12 Q. Is there no such thing as that  
13 document?

14 A. There's -- to my knowledge, there  
15 is no such thing as a stock purchase  
16 agreement evidencing Alper exchange of its  
17 debt for First City.

18 Q. What document -- what is the  
19 critical document, whether it be an asset  
20 purchase agreement, a stock purchase  
21 agreement, or other similar document that  
22 memorializes that transaction whereby  
23 Alper was compelled to exchange its debt  
24 for 55 percent of the common stock of  
25 First City?

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1  
2 A. I believe it would be the plan of  
Page 12

Bertellotti

reorganization and the plan of confirmation.

Q. The plan of confirmation. And is a copy of that located at your offices?

A. It should be.

Q. What sort of disclosures or schedules would have been created as part of the transaction whereby Alper was compelled to exchange its debt for 55 percent of the common stock of First City?

MR. SCOTT: Object to the form of the question.

MR. STEWART: State your objection.

MR. SCOTT: I just did. I objected to the form.

MR. STEWART: I am giving you a chance to tell me what it is so I can correct.

MR. SCOTT: You asked for an opinion.

MR. STEWART: I am asking for --

0030

(Whereupon Question is Read Back.)

THE REPORTER: Question, What sort of disclosures or schedules would have been created as part of the transaction whereby Alper was compelled to exchange its debt for 55 percent of the common stock of First City?

BY MR. STEWART:

Q. Can you answer that question?

MR. SCOTT: Same objection.

THE WITNESS: I can't. I am not a bankruptcy attorney. I have never been through a bankruptcy. I wouldn't know specifically -- numerous schedules, too numerous for me to speculate as to.

BY MR. STEWART:

Q. But there are schedules?

A. There's a lot of documents.

Q. And are those documents in files at

0031

your offices?

A. Yes, they would be.

Q. Now, let's turn to Paragraph 3, the documents memorializing the auction of Scovill Fasteners.

Where would I find those?

A. Those are in my office.

Q. Do those include the document price, any payments to officers, directors or related parties, the allocation environmental and tort liabilities, and the parties' representations and

Bertellotti

14 warranties?

15 A. To answer your question, the  
16 auction would probably not show those  
17 things, but there's a stock purchase  
18 agreement that would show that.

19 Q. Is that at your office, as well?

20 A. Yes, it is.

21 Q. For Paragraph 4, tell me, where  
22 would I find a copy of the note related to  
23 the Realty Holdings, Inc. loan you refer  
24 to in your affidavit?

25 A. There would be a copy of that in  
0032

1  
2 our office.

3 Q. Okay. Are there any other  
4 documents relating to that loan that you  
5 know of, at your offices?

6 A. Such as -- when you say other  
7 documents --

8 Q. I don't know. Are there any other  
9 documents that were created in connection  
10 with that loan?

11 A. Yes, I believe so. There's the  
12 note itself. I believe the note is  
13 further evidence that is referenced in the  
14 bankruptcy agreements, probably  
15 resolutions and things, part of the -- its  
16 genesis was in the bankruptcy  
17 reorganization. It was approved by the  
18 court. Those other documents, I believe,  
19 relate to this loan.

20 Q. Are those to be found at your  
21 offices?

22 A. Yes.

23 Q. Let's turn to Paragraph 5, the  
24 documents related -- rather, turn to  
25 Paragraph 6, Realty Holdings, Inc.'s  
0033

1  
2 financial statements.

3 Are those located at your offices?

4 A. I believe so, they may be. Realty  
5 Holdings has been dissolved. They may be  
6 in storage. Don't know precisely what  
7 would exist.

8 Q. Would financial statements have  
9 been created for 1992 through the time of  
10 Realty Holdings' dissolution for that  
11 entity?

12 A. Sir, I assume certainly so.

13 Q. And would financial statements on  
14 an annual basis have been created for all  
15 of Alper's first, second, third, forth  
16 tier subsidiaries?

17 A. Yes. Independent books and records  
18 are kept for all of Alper's subsidiaries.

19 Q. Are all those books and records  
20 kept at your offices?

21 A. To the extent the company is  
22 active, yes, they would be kept at our  
23 office. Well, no, not necessarily. It  
24 depends when you are speaking of -- which



Bertellotti

25 corporation you are speaking of.  
0034

1  
2 We had corporations in Los Angeles,  
3 Seattle, you know, other locations around  
4 the country with independent managements  
5 and those books would have been kept  
6 there. So there are certain records that  
7 are in Alper's records, many records  
8 probably in storage in various places  
9 around the country.

10 Q. Would the annual financial  
11 statements of Scovill and Saltire be kept  
12 at your offices?

13 A. In recent years, yes.

14 Q. By recent years, does that mean  
15 1992 forward?

16 A. Well, sir, I have been there since  
17 1993. Officer since 1997. Clearly, I  
18 think recent financial statements would be  
19 in the offices; prior years may have been  
20 sent off to storage. I don't know  
21 specifically.

22 Q. Where is storage?

23 A. There's, I believe, I don't know  
24 specifically. I know of a storage  
25 location in Connecticut, others in Los  
0035

1  
2 Angeles, but I think the primary storage  
3 area for New York office is in  
4 Connecticut.

5 Q. If you turn to Paragraph 7, how  
6 about the document showing the payment of  
7 \$3.1 million referenced in Paragraph 15 to  
8 Bertellotti?

9 A. Yes? What about those documents?

10 Q. Would they be found at your  
11 offices?

12 A. Yes, they would.

13 Q. And is there a board resolution  
14 whereby Saltire made Mr. Bauer  
15 vice-president of environmental affairs?

16 A. Yes, annual board resolutions  
17 dating to 1995.

18 Q. Where would those be found?

19 A. Those would be found in the minute  
20 books.

21 Q. Where are those kept?

22 A. Those are kept at the offices in  
23 New York.

24 Q. And the employment agreements of  
25 Nicholas Bauer and Patricia Thomson; could  
0036

1  
2 those be found in Alper's offices?

3 A. I would -- don't know who Patricia  
4 Thompson is. Never heard the name before.  
5 But Nicholas Bauer's employment agreement  
6 should be found in Alper's offices.

7 Q. Are all employment agreements,  
8 written employment agreements, for Alper's  
9 employees found at those offices?

10 Bertellotti  
 11 MR. SCOTT: Object to the  
 12 form. Seems that all Alper's  
 13 employees have employee  
 14 agreements.  
 15 BY MR. STEWART:  
 16 Q. Answer the question.  
 17 A. To the extent Alper employees have  
 18 employment agreements, they would be found  
 19 in the offices of Alper.  
 20 Q. Mr. Bertellotti, during the month  
 21 of November, are you leaving the country?  
 22 A. Of this year?  
 23 Q. Yes?  
 24 A. Possibly.  
 25 Q. Where do you think you'll go?  
 26 A. Argentina.

0037

1 Q. For how long?  
 2 A. Only for a few days.  
 3 Q. Otherwise, you are going to be in  
 4 the United States?  
 5 A. At this point in time, I expect to  
 6 be.  
 7 Q. Well, obviously you received our  
 8 notice of deposition and you were to  
 9 actually turn over the documents relating  
 10 to these affidavits on the 13th of October  
 11 and you elected not to, Counsel, despite  
 12 what we said to the Judge. Now we are  
 13 here in New York a thousand meters --  
 14 MR. SCOTT: I hate to  
 15 interrupt you. I am not going to  
 16 sit here and be lectured. If you  
 17 wish to ask a question, if you're  
 18 wanting to off the record and  
 19 discuss this with me, fine. But  
 20 I am not going to sit here and  
 21 let you lecture me.  
 22 MR. STEWART: I am not  
 23 lecturing you.  
 24 MR. SCOTT: I am too old  
 25

0038

1 for that. You can do whatever  
 2 you want. You don't need to tell  
 3 me you can do it.  
 4 MR. STEWART: You have the  
 5 opportunity today to cure this  
 6 problem. You can go get all  
 7 these records right now and then  
 8 we wouldn't have to return to New  
 9 York City in November and retake  
 10 this deposition at your client's  
 11 expense.  
 12 MR. SCOTT: Why says it,  
 13 that you think that you can serve  
 14 us with a totally ineffective  
 15 notice, served us with notice  
 16 addressed to an individual  
 17 deposition --  
 18 MR. STEWART: An individual  
 19 who is president.  
 20

21 Bertellotti  
 22 MR. SCOTT: Are you going  
 23 to let me finish?  
 24 MR. STEWART: Yes, go  
 25 ahead.  
 0039 MR. SCOTT: And not serve,  
 1  
 2 serve a subpoena on him. When  
 3 you -- if that was to a party,  
 4 would I not have 30 days to  
 5 respond under Rule 34? I think  
 6 if you will read the rule, you  
 7 will see that it is.  
 8 So why do you think when  
 9 you elect to use an erroneous  
 10 form, not follow the rules, that  
 11 we should break our backs to give  
 12 you documents that we haven't  
 13 been properly asked for?  
 14 MR. STEWART: Mr. Scott,  
 15 were you supposed to give these  
 16 documents to us voluntarily on  
 17 the 13th?  
 18 MR. SCOTT: No, sir.  
 19 MR. STEWART: Pursuant to  
 20 our discussion in court?  
 21 MR. SCOTT: No, sir. Now  
 22 listen.  
 23 MR. STEWART: I am. You  
 24 listen to me.  
 25 MR. SCOTT: The Judge said  
 0040  
 1  
 2 I had to give you documents that  
 3 these gentlemen relied on. That  
 4 was his order. Period.  
 5 MR. STEWART: Mr. Scott, I  
 6 am telling you what I am going to  
 7 do.  
 8 MR. SCOTT: Last night,  
 9 during our deposition  
 10 preparation, we realized for the  
 11 first time that one document was  
 12 relied upon by Mr. Bertellotti.  
 13 And that's the document that  
 14 reflects the September 16  
 15 formation date for Alper  
 16 Acquisition Corporation and  
 17 Mr. Lucas delivered that to you,  
 18 and I will ask this be marked  
 19 Exhibit 2 to the deposition.  
 20 That is the only document that I  
 21 was ordered to give you. I gave  
 22 it to you through Mr. Lucas last  
 23 night.  
 24 The second document we gave  
 25 you last night was one page that  
 0041  
 1  
 2 was relied upon by Mr. Smith with  
 3 respect to some figures. So we  
 4 gave you that last night. If you  
 5 will read that order --

Bertellotti

MR. STEWART: Mr. Scott, what are you talking about? You said you gave me some documents last night.

MR. SCOTT: Yes.

MR. STEWART: You didn't give me documents last night.

MR. SCOTT: Mr. Lucas delivered them to you.

MR. LUCAS: I left them at the Hyatt before you checked in. There's an envelope with your name on it. And they said they would deliver it to you when you checked in.

MR. SCOTT: There's two documents. Let's mark it Exhibit 2.

MR. STEWART: This is my deposition. I will mark the

Exhibits if you hand them to me. Those that I haven't seen yet, hand them to me.

MR. SCOTT: Let's go back to the transcript.

MR. STEWART: You know, Mr. Scott, you're right. You don't need a lecture. I am telling you what I am going to do so you have an opportunity today to cure this problem that you have created.

MR. SCOTT: Oh, no, I didn't create it. You created it.

MR. STEWART: You had these notices. The purpose of discovery is to provide information in an efficient form, and you have these notices. You made no effort to contact our firm and clarify the notices or do anything else. Not a problem. We will simply file a document

request with you and return in November at your expense to retake these depositions, which is a complete waste of everybody's time.

MR. SCOTT: We may return in November; we may not. It may be some other date, depending on scheduling. We will be happy --

MR. STEWART: I am telling you what we are going to do. I just wanted to make sure you had the opportunity to cure this problem today. Let's move on.

MR. STEWART: I am going to

Bertellotti

hand you a letter.

MR. SCOTT: Before you hand them that letter, I want to put on the record the Judge's statement in the September 19 hearing in rebuttal to Mr. Stewart's assertion that I was ordered or agreed or anything else to turn over any documents

other than is relied on by these witness preparation of affidavit.

On Page 13 of that transcript the Court stated, quote, well, I assume Mr. Durant's oral motion to produce, comma, so you will produce any documents that anybody relied on in preparation of their affidavit.

Now, that was the court order, Mr. Stewart. And if you choose to, you can look at the transcript and confirm that or you can take issue with it. But I resent the idea that we have created a problem. We did what the Court ordered us to do.

Admittedly, we didn't serve you with those three pages until last night; and if you didn't get them last night, then we gave them to you this morning and I am sorry you didn't get them, that

the hotel didn't give them to you. It's kind of like the documents you served me the night before the September 19 hearing.

MR. STEWART: The day after you refiled your relying 50 pages.

MR. STEWART: Please hand it to the witness. Mark that as Exhibit 2 and let's proceed.

MR. LUCAS: Mike, please don't waste all of our time arguing this morning. Let's get on.

MR. STEWART: I am not wasting the time.

MR. LUCAS: Stop --

MR. STEWART: You know, Mr. Lucas, we are wasting time.

MR. LUCAS: I will not have you interrupting me. I am going to talk and then you are going to talk.

MR. STEWART: I agree with

Bertellotti

you. Go ahead.

MR. LUCAS: All I am saying, we are here to take a deposition on jurisdictional issues. Please stop arguing with Mr. Scott and just take your deposition. That is all I am asking.

MR. STEWART: First of all, obviously your comments should be directed at both Mr. Scott and I. And what I will tell you, John, is that if we wanted to take an efficient deposition and not waste everyone's time, these documents would have been provided so we don't have to go through this charade. But in any event --

MR. SCOTT: Why is it -- Mr. Stewart, let me ask you, why is it that you think we shouldn't have the right to object to the scope or the breadth of the

proper document requests? I mean, you have chosen not to follow the rules and you are blaming that on us, and I don't think that is appropriate or fair.

When I said we would be happy to come back here, I am going to take that back. You are going to have to make me come back up here for these documents.

BY MR. STEWART:

Q. Do you recognize the document in front of you?

A. I haven't been given another.

MR. STEWART: Can you mark that as Exhibit 2 and hand it to him?

(Whereupon Exhibit 2 is Marked.)

THE WITNESS: Yes, I recognize this.

BY MR. STEWART:

Q. What is it?

A. It's an affidavit. It was prepared by my behalf. It was my affidavit. I don't know what else.

Q. Does it reflect your statements?

A. Yes, it does.

Q. And have you reviewed it recently?

A. Yes, I have.

Q. And do you have any changes to make that would make it more accurate?

A. I do not.

Q. So does it reflect your views

Bertellotti

13 accurately, to your mind?  
14 A. Everything in there, I believe, is  
15 accurate.

16 MR. STEWART: Mark this  
17 letter as Exhibit 3.  
18 (Whereupon Exhibit 3 is  
19 Marked.)

20 BY MR. STEWART:  
21 Q. Are you familiar with Exhibit 3?  
22 A. Yes, I am.  
23 Q. Now, did you in fact review your  
24 affidavit with Mr. Scott?  
25 A. Yes, I did.

0049

1 Q. And when we talk about the  
2 affidavit, is that the affidavit that is  
3 Exhibit 2?  
4 A. Yes, it is.  
5 Q. Is that the affidavit that  
6 Mr. Scott refers to in this letter that is  
7 Exhibit 3?  
8 A. I believe so, but I think what this  
9 filing -- I believe there were 2  
10 affidavits filed that had been filed in a  
11 previous response, but I think technically  
12 there were 2 affidavits of mine. I think  
13 there was an affidavit with our motion to  
14 dismiss for lack of personal jurisdiction,  
15 and I think that affidavit was filed yet  
16 again with this affidavit and that  
17 response. I think.

18 MR. STEWART: I would like  
19 to mark that as Exhibit 4.  
20 (Whereupon Exhibit 4 is  
21 Marked.)

22 BY MR. STEWART:  
23 Q. Did you -- I have handed you  
24 Exhibit 4.  
25

0050

1 Do you recognize that?  
2 A. Yes, I do.  
3 Q. What is it?  
4 A. It's my affidavit.  
5 Q. Is that the second affidavit you  
6 referred to?  
7 A. That is -- it's the second  
8 affidavit I referred to just now. I  
9 believe it's the first affidavit that  
10 was filed in this case on my behalf.  
11 Q. So did you review both affidavits  
12 with Mr. Scott?  
13 A. Yes, I did.  
14 Q. And did you determine that, in  
15 fact, you did not rely on any documents in  
16 preparing those affidavits?  
17 A. Well, what we focused on  
18 specifically was the second affidavit in  
19 terms of stating that we did not  
20 produce -- that we did not rely on any  
21 documents.  
22

23 Q. When you say the second affidavit,

Bertellotti

you focused on Exhibit 2 in determining  
you did not rely on any documents?

0051

1

2

A. Yes. I believe you are talking in  
the context of Mr. Scott, the October 9  
letter he wrote to you?

5

6

Q. Yes.

7

A. Principally, we focused on this  
Exhibit 2 affidavit.

8

9

Q. So for your Exhibit 2 affidavit,  
did you consult any documents in  
connection with the creation of that  
affidavit?

10

11

12

A. Yes. In hindsight, it turns out I  
consulted a single document, document  
relating to the specific date of  
incorporation of Alper Acquisition  
Corporation. It was a technical  
oversight. It doesn't seem to be a fact  
in general within dispute and seems to be  
immaterial to the affidavit in its --

18

19

20

Q. I would like to mark that as an  
Exhibit.

21

22

(Whereupon Exhibit 5 and  
Exhibit 6 are Marked.)

23

24

BY MR. STEWART:

25

Q. You are now looking at another

0052

1

2

Exhibit.

3

4

Do you recognize that document?

5

6

A. Yes, I do.

7

8

Q. What is that document?

9

10

A. That document is also a document  
that I had prepared on my behalf in  
preparation for our response, our reply  
brief. That was filed -- I can't

11

12

remember. I think it was prepared in

13

14

response to the first reply brief.  
I did not rely on this in my  
affidavit, but I had this prepared in  
preparation for one of our two responses  
in this lawsuit.

15

16

Q. You had Exhibit 6 prepared in  
preparation for your responses?

17

18

A. Yes.

19

20

Q. And Exhibit 5, is that the document  
you did rely on?

21

22

A. Yes.

23

24

Q. On preparing the affidavit?

25

A. Yes, that's the document I did rely  
on.

0053

1

2

consult any documents in connection with  
preparation of the affidavit to Exhibit 2?

3

4

A. I did not, in preparation for the  
affidavit.

5

6

Q. For periods predating your  
employment, what did you rely on in  
creating the statements in your affidavit?

7

8



Bertellotti

9 A. Do you want to be specific? For an  
10 example?

11 Q. Well, let me put it this way.  
12 Before September 1993, did you have any  
13 connection at all with Alper Holdings USA?

14 A. I did not.

15 Q. Did you know anybody that worked  
16 there before that day?

17 A. Generally speaking, no.

18 Q. So, generally speaking. Why do you  
19 qualify?

20 A. There was a gentleman named  
21 Nicholas Combemale who I knew who was  
22 working there.

23 Q. Did you and Mr. Combemale discuss  
24 Alper's business prior to your going to  
25 Alper in September '93?

0054

1  
2 A. Yes.

3 Q. Did any of those discussions inform  
4 your affidavit?

5 MR. SCOTT: I beg your  
6 pardon. Let me object to the  
7 form.

8 MR. STEWART: Read back the  
9 question, please.

10 (Whereupon Question is Read  
11 Back.)

12 THE REPORTER: Question,  
13 Did any of those discussions  
14 inform your affidavit?

15 MR. SCOTT: Object to the  
16 form.

17 THE WITNESS: To a minimal  
18 extent, yes. He was involved in  
19 the First City bankruptcy and he  
20 explained to me his involvement  
21 with the company, how they came  
22 about to own 55 percent interest,  
23 but --

24 BY MR. STEWART:

25 Q. For any statements in your

0055

1  
2 affidavit that cover periods prior to  
3 1993, where would you have gotten that  
4 information?

5 A. Please understand, I have worked  
6 for the company over ten years now. And  
7 in the course of working for this company  
8 for over ten years and conducting these  
9 business affairs, I have had numerous  
10 occasions to review numerable historical  
11 documents relating to periods prior to my  
12 involvement in the company. There's been  
13 reasons to familiarize myself with the  
14 documents with ongoing issues, and so I  
15 couldn't even begin to tell you all the  
16 different historical documents I have come  
17 across in the course of the last ten years  
18 and that I have become familiar with and  
19 to some personal level with respect to --

Bertellotti

20 Q. So when you say personal knowledge  
21 for periods prior to September '93, does  
22 that mean knowledge from these historical  
23 documents you referred to?

24 A. Yes, it could have been historical  
25 documents, it could have been verbal

0056

1  
2 recitations, news accounts, variety of  
3 documents. Legal documents, contracts,  
4 magazine articles, any number of things  
5 that I have come across. I didn't look at  
6 any of those in preparing my affidavit,  
7 but generally that is how I gained  
8 knowledge with regard to historical  
9 statements, as through my tenure of the  
10 company and reviewing, as I said, numerous  
11 conversations with now former employees  
12 but were employees of Scovill.

13 Q. Just to be clear, can you think of  
14 any other source of information, other  
15 than these discussions with former  
16 employees, news accounts and these  
17 historical documents?

18 MR. LUCAS: Any?

19 MR. SCOTT: I am going to  
20 object on the form, if you  
21 intended that to be a complete  
22 recitation of the things he said,  
23 because you left out some things.

24 MR. STEWART: I will  
25 rephrase to make it clear.

0057

1  
2 BY MR. STEWART:

3 Q. Can you tell me whether your  
4 statements regarding periods prior to  
5 September '93 are based on anything other  
6 than statements of former employees, news  
7 accounts, or these historical documents  
8 that you have referenced?

9 MR. SCOTT: Including all  
10 that he referenced and, if so, I  
11 won't object.

12 THE WITNESS: Including all  
13 that I referenced, whether it's  
14 contracts, financial statements,  
15 SEC filings. I would have to go  
16 on and on and think for a few  
17 minutes. Over the ten years,  
18 literally thousands of documents  
19 in existence.

20 BY MR. STEWART:

21 Q. I don't mean to be obtuse, Mr.  
22 Bertellotti. I want to make sure that  
23 when we are talking about the category of  
24 information that you would have relied on,  
25 it would have been statements of former

0058

1  
2 employees; is that one category?

3 A. Certainly.

4 MR. SCOTT: Object to the  
Page 24

Bertellotti

5 form.

6 BY MR. STEWART:

7 Q. Another category would be  
8 statements in these historical documents,  
9 all of which you have listed?

10 MR. SCOTT: Object to the  
11 form of the immediately preceding  
12 question.

13 He started to answer it  
14 before I can get my objection  
15 out. So make it clear to you, he  
16 did not rely on any other single  
17 document in preparation of the  
18 affidavit.

19 He gained his personal  
20 knowledge through his work over  
21 the years, so I want to make that  
22 objection.

23 BY MR. STEWART:

24 Q. Okay. I think that is a speaking  
25 objection, which is prohibited. But I am

0059

1  
2 trying to find out where you got your  
3 information.

4 Now, is one source of the  
5 information for periods -- for statements  
6 that address periods prior to the time you  
7 were employed at Alper, news accounts?

8 A. Yes, it could be.

9 Q. Is another source what you refer to  
10 as historical documents, including SEC  
11 filings, corporate documents, and the  
12 like?

13 A. Yes.

14 Q. Is another source statements of  
15 former employees?

16 A. Yes.

17 Q. Can you list for me every other  
18 source, if there are any, of information  
19 that you would have relied on in making  
20 statements that address periods prior to  
21 your employment?

22 MR. SCOTT: Same objection.

23 MR. LUCAS: I object to the  
24 form of the question.

25 BY MR. STEWART:

0060

1  
2 Q. Go ahead and answer the question.

3 A. Mr. Stewart, without thinking here,  
4 I can't think of every type of document,  
5 every document that I have seen in the  
6 course of ten years that I would have  
7 gained knowledge from. But generally  
8 speaking, those are the principal kind of  
9 documents that I have come across and have  
10 gained personal knowledge from.

11 MR. SCOTT: At a convenient  
12 time, I would like to take a  
13 break.

14 MR. STEWART: That is fine.  
15 (Whereupon a Recess is

Bertellotti

16 Taken.)  
17 BY MR. STEWART:  
18 Q. Mr. Bertellotti, back on the record  
19 after a break.  
20 Do you see the statement on your  
21 affidavit, Paragraph 1, I believe such  
22 information is true?  
23 MR. LUCAS: Which  
24 affidavit?  
25 MR. STEWART: Exhibit 2.

0061

1  
2 THE WITNESS: Exhibit 2.  
3 Yes, I do.  
4 BY MR. STEWART:  
5 Q. And what does that statement refer  
6 to?  
7 A. It says precisely what it says. I  
8 believe such information was true.  
9 Q. Is that referring to the  
10 information assembled by Alper Holdings  
11 and subsidiaries?  
12 A. I am making this affidavit based on  
13 my personal knowledge and information  
14 assembled by Alper subsidiaries. It says  
15 what it says. I don't know.  
16 Q. Here, let me make it more clear.  
17 Does the statement, I believe such  
18 information is true, does that refer to  
19 every statement in this affidavit that you  
20 make, that you believe it's true?  
21 A. Yes. To my knowledge, all of these  
22 statements are true.  
23 Q. Okay. It doesn't refer or does it  
24 refer, also, to what you state the  
25 information -- the underlying information

0062

1 assembled by Alper and/or its  
2 subsidiaries?  
3 A. I have every reason to believe that  
4 is accurate, as well.  
5 Q. You believe that information is  
6 true?  
7 A. Yes.  
8 Q. Let's talk about the companies you  
9 are involved in.  
10 Are you president of any company  
11 other than Alper Holdings USA, Inc.?  
12 A. Yes, I am the president of Saltire  
13 Industrial, Inc.  
14 Q. Any other companies?  
15 A. Yes, there is one other company  
16 that I am currently the president of,  
17 which is Saltire subsidiary Alper  
18 Development, Inc.  
19 Q. Are those the only companies that  
20 you are currently president of?  
21 A. Yes.  
22 Q. And since you have been at Alper --  
23 since September '93, have you been  
24 president of any other companies?  
25

0063

Bertellotti

1

2 A. I have.

3 Q. Can you tell me what companies you  
4 have been president of since you have been  
5 at Alper?

6 A. I could recite some, probably not  
7 all.

8 Q. Why don't you recite the ones you  
9 know?

10 A. I think it's probably best to give  
11 you some historical context. Because it  
12 changes year by year, depending on status  
13 of the operations.

14 In 1997, when I was first made an  
15 officer, I was senior officer of both  
16 Alper Holdings and Saltire Industrial. To  
17 my recollection, I don't know what else I  
18 would have been the senior officer of at  
19 that point in time. Again, at that  
20 particular point in time, we had other  
21 operations. They were active. They had  
22 their independent presidents. Alper  
23 Development had its own president. There  
24 was a company called the Alper Ink Group,  
25 which had its own senior officer. There

0064

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2 was a company in Seattle, Alper Northwest,  
3 Inc., which had its own president.

4 So you know, this is all relative  
5 to a specific time and status of the  
6 company. But as it started out, I was  
7 made the president of Alper Holdings and  
8 Saltire Industrial. Any other active  
9 subsidiaries, I was not the president of.  
10 There are other subsidiaries beginning in  
11 that time frame I was probably president  
12 of, but I was inactive -- they were  
13 inactive companies, but under California  
14 law they were required to have officers,  
15 so I may very well have been the senior  
16 officer of other entities that were  
17 inactive at the time.

18 Q. Can you recall those entities at  
19 the moment?

20 A. I certainly couldn't recall  
21 specifically what they were. I would  
22 suggest I was probably the president of  
23 Alper Securities at that point in time,  
24 but I wouldn't know for certain without  
25 checking the records.

0065

1

2 I wouldn't want to speculate  
3 precisely as to where I was not president  
4 at the time, but what happens in the later  
5 years is the company -- I think as we said  
6 in our affidavit -- in 2000 we sold off  
7 all of the active businesses, the active  
8 operations, and we were left with a number  
9 of corporations. And in some instances,  
10 we sold stock in corporations. We no  
11 longer had it.

Bertellotti

12 In other instances, with the sale  
13 of real estate in Seattle, we sold assets.  
14 And there were a number of corporations  
15 that were left until their time of  
16 dissolution under law that were required  
17 to have officers, so I was probably made  
18 the senior officer of those corporations.  
19 So it's fairly dynamic, depending on the  
20 particular time as well as the status of  
21 the corporation.

22 Q. Did the period in which you were  
23 the senior officer for Saltire Industrial  
24 and Alper Development, Inc. run from '97  
25 to 2000?

0066

1  
2 A. No, would I not have been -- those  
3 would not have been simultaneously.  
4 Again, let me make sure I understand.  
5 Saltire Industrial, Inc. and Alper  
6 Development, Inc. No, I was made  
7 president of Saltire in 1996 -- I was made  
8 managing director, senior officer of  
9 operations at the time September of  
10 mid-'97, and I did not become the senior  
11 officer of Alper Development, Inc. until  
12 1990 or 1999. Once that business had been  
13 developed, the majority of its operations  
14 and the acting president was gone.

15 Q. And you became managing -- when did  
16 you become managing director of Alper?

17 MR. SCOTT: Object to the  
18 form.

19 THE WITNESS: I believe I  
20 answered that.

21 BY MR. STEWART:

22 Q. When did you become managing  
23 director of Alper Holdings USA, Inc.?

24 A. I believe it was approximately July  
25 of 1997.

0067

1  
2 Q. Okay. Now can you tell me in 2000,  
3 briefly for me, the active operations that  
4 were sold off that you referred to?

5 MR. SCOTT: Object to the  
6 form. Can you be more specific,  
7 please?

8 BY MR. STEWART:

9 Q. Let me rephrase. I believe you  
10 stated that in 2000, Alper Holdings sold  
11 off a number of its active operations.  
12 Was that --

13 A. I was speaking generically, but we  
14 sold the Alper Ink -- Saltire sold off  
15 Alper Group in May 2000.

16 Q. Was -- were there any other active  
17 operations that were sold off in 2000?

18 A. We also sold a company called Alper  
19 Northwest.

20 Q. When was that sale completed?

21 A. I believe it was April of 2000.

22 Q. Now, did you take on the role of

Bertellotti

23 president of any corporation in 2000, any  
24 new corporations?

25 A. Again, Mr. Stewart, without  
0068

1  
2 referring to corporate documents and  
3 specific records it's very hard for me to  
4 sit here, precisely what happened at what  
5 point in time.

6 Q. Tell me, if I wanted to know when  
7 you were president of the various  
8 affiliates of Alper Holdings USA, Inc.  
9 during the period '93 through the present,  
10 what documents I would look at?

11 A. We would have to look at the  
12 corporate records, minute books.

13 Q. Would it be the minute books?

14 A. Generally speaking, yes.

15 Q. Minute books of director meetings?

16 A. Well, the minute books appointing  
17 the officers and directors, or the  
18 resolutions appointing the officers and  
19 directors.

20 Q. Can you tell me, are all -- since  
21 you have been at Alper Holdings USA, have  
22 all of its subsidiaries had the same  
23 governing structure?

24 A. I don't understand what you mean by  
25 same governing structure.

0069

1  
2 Q. Why don't we go company by company?  
3 Have you ever been an officer of  
4 any company in the capacity other than  
5 president, president or senior executive?

6 A. Again, without referring to the  
7 documents, maybe. I don't know off the  
8 top of my head. I suspect I may have been  
9 secretary of a corporation.

10 Again, under various state laws,  
11 you are required to have specific  
12 officers; and in the latter years, when  
13 there were only a few employees left and  
14 there were these inactive corporations  
15 prior to the dissolution, it's possible  
16 that I was made not just president but  
17 possibly the secretary as well, for  
18 example, and again that would be because  
19 the companies are inactive, waiting for  
20 dissolution.

21 Q. But can you, sitting here without  
22 reference to the corporate records, tell  
23 me what companies you served as an officer  
24 for?

25 A. Specifically?  
0070

1  
2 Q. Yes.

3 A. And accurately in its entirety,  
4 probably not.

5 Q. Without those records, can you tell  
6 me what companies you are president of?

7 A. I can tell you of the active -- in

Bertellotti

8 what period are you talking about?

9 Q. 1993 to the present.

10 A. I have told you several times, from  
11 1993 to 1997 I wasn't an officer of any  
12 company. Okay.

13 Q. From 1997 to the present?

14 A. In 1997, I was certainly made the  
15 officer of Alper -- senior officer of  
16 Alper Holdings, as well as Saltire  
17 Industrial. It's also possible I was  
18 made the senior officer of a couple of  
19 other inactive companies. An example  
20 might be Alper Securities, Inc., which  
21 held -- it was inactive. It held a couple  
22 of securities partnerships but for the  
23 most part they -- they were not engaged in  
24 active operations. But they were  
25 companies that were awaiting dissolution,

0071

1 and we were required by law to have  
2 officers and directors.

3 Q. I just wonder if can you tell me,  
4 without reference to corporate documents  
5 and records, which one of those various  
6 companies you were president of?

7 MR. SCOTT: Asked and  
8 answered.

9 BY MR. STEWART:

10 Q. Please answer the question.

11 A. I believe I answered it.

12 Q. Please answer it again.

13 A. I could tell you with a reasonable  
14 degree of accuracy which companies, and I  
15 probably wouldn't get everything right  
16 without having access to the corporate  
17 records.

18 Q. Why don't you, to a reasonable  
19 degree of accuracy, tell me what those  
20 companies are?

21 A. President of Alper Holdings.  
22 President of Saltire Industrial. I became  
23 at one point in time the president of  
24 Alper Development, Inc. Approximately 1998

0072

1 or 1999, as I told you. Then beyond that,  
2 I don't want to speculate.

3 Q. Do you have an employment agreement  
4 with Alper Holdings USA?

5 A. I have, in a sense. I have what I  
6 call a letter agreement.

7 Q. It's written?

8 A. It's written.

9 Q. It's at the company headquarters?

10 A. Yes.

11 Q. Do you have an employment agreement  
12 with any other company?

13 A. The employment agreement is written  
14 with Alper Holdings.

15 Q. And is there any other employment  
16 agreement with any other company?

17 A. No, there's not.



Bertellotti

19 Q. Right now, can you tell me how you  
20 divide your time amongst the companies?  
21 Amongst Saltire and Alper Holdings USA?

22 MR. LUCAS: Object to the  
23 form of the question.

24 MR. STEWART: Well, I think  
25 you are objecting to the temporal

0073

1  
2 component.

3 BY MR. STEWART:

4 Q. Can you tell me in 2003, how you  
5 divide your time between Saltire  
6 Industrial and Alper Holdings USA?

7 MR. LUCAS: I object to the  
8 form of the question.

9 BY MR. STEWART:

10 Q. Please answer the question.

11 A. Yes, I understand the question, I  
12 believe so. I do it on a need basis and  
13 in 2003, I spent the vast majority of my  
14 time dealing with the business affairs of  
15 Saltire Industrial.

16 Q. What do you mean by vast majority  
17 in terms of percentage?

18 A. Probably upwards of 90 percent,  
19 currently.

20 Q. Can you tell me when Saltire  
21 Industrial operations began to take up  
22 over 75 percent of your time?

23 A. I have always devoted a substantial  
24 amount of time to Saltire Industrial. I  
25 would say over 50 percent since I have

0074

1  
2 been with the company. But it has  
3 increased in recent years. It has been  
4 the sole company with activities going on  
5 in the last couple of years. And it  
6 varies, depending on what is going on with  
7 regard to litigation, various  
8 environmental issues, retiree issues, but  
9 it's increased in the late -- in the last  
10 couple of years.

11 Q. How long has Saltire been, as you  
12 said, the sole company with things going  
13 on in Alper?

14 A. In effect, since we sold off  
15 operations. Since late 2000, the majority  
16 of our activities have been focused on  
17 Saltire.

18 Q. Are you shareholder of any  
19 privately held company?

20 A. None whatsoever.

21 Q. Were you an officer, director, or  
22 agent of any company other than companies  
23 affiliated with Alper Holdings USA, Inc.?

24 A. I am an officer -- I am sorry, I am  
25 a director of a company called CashX, Inc.

0075

1  
2 C-a-s-h- X, with a big X.

3 Q. Does that have any relationship to

Bertellotti

Alper Holdings USA, Inc.?

A. No.

Q. Does it have any relation to any subsidiaries of Alper Holdings?

A. What do you mean by affiliates?

Q. Does it have affiliates to Group?

A. No.

Q. Does it have any relation to Carlos Peralta?

A. I believe it has connections to some of the direct share.

Q. Who do you think it -- which indirect shareholders do you believe CashX has a direct relationship with?

A. Gentleman named Alejo Peralta.

Q. You serve as director of that company?

A. I am director.

Q. How many directors are there?

A. There are four.

Q. Who are they?

A. Peter Ax, A-X, is his last name.

Peter Ax, Alejo Peralta, and a gentleman named Juan Santaja.

Q. Do you receive compensation for your director job?

A. I do not.

Q. What business is CashX in?

MR. SCOTT: I object to the relevance of this on the jurisdictional questions.

BY MR. STEWART:

Q. What business is CashX in?

A. They issue prepaid Visa cards.

Q. Where are they incorporated?

A. I believe Delaware.

Q. Is it public?

A. No, it's not.

Q. Let's turn to Alper Holdings USA, Inc. How many employees does Alper have today?

A. We have six direct employees.

Q. What are their names?

A. You have myself; Wayne Smith, who is in the room -- actually we have five. I misspoke. We have five. Marjorie

Alexander, Mark Silverman, and Wayne.

Trish's name is escaping me. Can I ask?

Marjorie's daughter. It's escaping me for the minute.

Q. What does Ms. Alexander do?

A. She administers the retiree benefits associated with Saltire Industrial.

Q. What does Mark Silverman do?

A. He is the vice-president of administration.

Q. What does Trish do?

A. She also administers the retiree

Bertellotti

15 benefits.

16 Q. Which of these employees have  
17 employment contracts? We talked about  
18 you.

19 A. Only Mr. Smith.

20 Q. The others at-will?

21 A. Yes.

22 Q. So you never heard of a person  
23 named Patricia Thompson?

24 A. I don't know who that is.

25 Q. Now, how many employees did Alper  
0078

1 Holdings have when you arrived in 1993?

2 A. I don't know. Again, I wasn't  
3 involved in corporate governance and  
4 administration of the company. There were  
5 more than there are today.

6 Q. Well, when you became president or  
7 the chief executive officer in 1997, how  
8 many employees did Alper have?

9 A. I would say approximately 20 to 25.

10 Q. Can you give me a general breakdown  
11 of those employees? Not by name, but what  
12 they did?

13 A. Function -- there was legal,  
14 accounting, accounts payable, benefits  
15 administration, management of information  
16 systems, tax, clerical, insurance  
17 administrator, human resources. That  
18 pretty much covers it. That probably  
19 catches most of it.

20 Q. In 2000 when -- after Alper Ink was  
21 sold, how many employees did Alper have?

22 A. Immediately following the sale?

23 Q. Sure.

24 MR. SCOTT: Are we are  
0079

1 talking Alper Holdings USA? Is  
2 that the question?

3 MR. STEWART: In fact, that  
4 is a good clarification. Can we  
5 agree, during the deposition if I  
6 refer to Alper without  
7 qualifications, I am referring to  
8 Alper Holdings USA, Inc.

9 MR. SCOTT: I prefer not.  
10 There are still -- that leaves  
11 open confusion, so we would  
12 prefer --

13 THE WITNESS: It's probably  
14 safe.

15 BY MR. STEWART:

16 Q. Then for Alper Holdings USA, Inc.,  
17 I take it, it was for that entity, was it,  
18 that you said there were 20 to 25  
19 employees in '97?

20 A. That's correct.

21 Q. For that entity, Alper Holdings  
22 USA, Inc., how many employees in, say, May  
23 of 2000?

24 A. 2000, I would say 10 to 14.

Bertellotti

0080

1  
2 Q. Can you now tell me from 2000, four  
3 and how we got to five?

4 A. Yes. As the corporate structure  
5 had become simpler in terms of selling  
6 off, for example, the operating group,  
7 realizing -- generally speaking, the  
8 corporate business got less complicated  
9 with various businesses and various  
10 subsidiaries that were sold. Lot of  
11 things matured. We came about owning --  
12 this current ownership came about in 1992,  
13 1993 as the various issues worked  
14 themselves out over the years. The issues  
15 facing us became more complex. We needed  
16 less people.

17 Q. How many employees did you have in  
18 2001, say, December 2001?

19 A. Seven.  
20 MR. LUCAS: You mean Alper  
21 Holdings USA, Inc.

22 THE WITNESS: Alper  
23 Holdings, I would say six to  
24 eight.

25 BY MR. STEWART:

0081

1  
2 Q. Alper Holdings USA had six to eight  
3 in December 2001?

4 A. Yes. I mean, you are asking  
5 specific questions to which I am just  
6 reluctant to speculate and answer with  
7 nine or seven. I mean --

8 Q. Well, could you speculate -- strike  
9 that.

10 In December 2002, how many  
11 employees would you say Alper Holdings USA  
12 included?

13 A. End of last year?

14 Q. Yes.

15 A. There were six.

16 Q. Who is left? Who has left the  
17 company since December of last year?

18 A. Nick Bauer.

19 Q. When did Nick leave?

20 A. Nick left in September of this  
21 year.

22 Q. Was he fired?

23 A. No, he was not.

24 Q. Do you know what he is doing now?

25 A. He's been retained by Sal tire

0082

1  
2 Industrial, Inc. as a consultant. I  
3 believe he does other independent  
4 consulting work.

5 Q. Before Nick Bauer left, did he have  
6 an -- I think you answered that. He had  
7 an employment agreement?

8 A. He had a letter agreement, we  
9 called it.

10 Q. Did he have that for all the years

Bertellotti

11 he work at Alper?

12 A. I believe so.

13 Q. Did he have a letter agreement with  
14 any other entity?

15 A. Not to my knowledge.

16 Q. How much time did he devote to  
17 environmental issues relating to Saltire  
18 Industrial?

19 A. There's a temporal element to that  
20 question but would I say the vast --  
21 anywhere between 90 to 95 percent of his  
22 time. As much as 100 percent of his time.

23 Q. And does that 90 to 95 percent of  
24 his time apply to the years '95 through  
25 his leaving that company this year?

0083

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2 A. Yes.

3 Q. To whom did he report?

4 A. He report -- reports to, most  
5 commonly to Wayne Smith. We don't have  
6 a -- it's a small company. We don't have  
7 a formal reporting structure, but he  
8 routinely reported to Wayne Smith,  
9 although he speaks to me on a regular  
10 basis.

11 Q. Okay. What do you mean by regular  
12 basis?

13 A. There is no specific routine or  
14 scheduled call, but Nick contacts us as  
15 needed to discuss the status and issues of  
16 various of Saltire's environmental issues.

17 Q. How many times a year would you say  
18 you talked to Nick Bauer during the time  
19 he was employed at Alper?

20 A. I would say anywhere between 30 and  
21 60 times. I would speak to him anywhere  
22 between -- I would say in my case, maybe  
23 25 to 40 times a year.

24 Q. And?

25 A. May speak to Mr. Smith more often  
0084

1

2 than that.

3 Q. Would the majority of these calls  
4 be formally scheduled meetings, or contact  
5 as needed?

6 A. Combination of the two.

7 Q. Was Nick Bauer free to call you  
8 directly to discuss issues?

9 A. Any time he would like, he can call  
10 me as president of Saltire.

11 Q. You said as the president of  
12 Saltire. Tell me what -- whether you'd  
13 take any formal action at the time you  
14 contacted Nick Bauer to talk to  
15 distinguish yourself as the president of  
16 Saltire, as opposed to the president of  
17 Alper.

18 A. That was very clear. Because it's  
19 always very obvious to us whose business  
20 is before us. I think -- as we said in my  
21 affidavit, we maintain separate books and

Bertellotti

22 records, separate accounts, separate  
23 minutes, separate officers and directors.  
24 Granted, there's overlap. Whatever  
25 business is in front of you, it is very

0085

1  
2 clear to us what business that relates to.  
3 And so we take all actions and discuss all  
4 things in the context of that corporation,  
5 its specific interests, and there is no  
6 confusion. It's very straightforward.

7 Q. Did Nick Bauer file written reports  
8 of his activities?

9 A. Yes.

10 Q. How often?

11 A. Nick Bauer would send what would be  
12 a weekly, biweekly -- on average, probably  
13 every two weeks and, again, it wasn't  
14 formal, but roughly every two weeks he  
15 would send a brief environmental update  
16 where he would update us to specific  
17 activities on sites when there was  
18 something to speak about. You also asked  
19 if I had certain other, more substantive  
20 reports. Certainly there was an annual  
21 review, other reviews in the interim  
22 period as needed.

23 Q. What did Nick Bauer do, in your  
24 mind, exclusively for Alper Holdings USA?

25 A. Well, when he wasn't dedicating 100

0086

1  
2 percent of his time to Saltire, if there  
3 were acquisitions -- for example, when  
4 Saltire subsidiary, the operating group,  
5 was in the process of acquiring other  
6 businesses, he may have conducted due  
7 diligence Phase 1 environmental surveys  
8 with respect to some of those  
9 acquisitions. He may have consulted  
10 Saltire's other subsidiary ADI with  
11 respect to some of its property land  
12 development activities in California.

13 Q. In your mind, was any of the time  
14 he spent on activities unrelated to  
15 Saltire Industrial, Inc.'s contaminated  
16 sites billed or charged to Alper Holdings  
17 USA, Inc.?

18 A. I don't think so. To my  
19 recollection, there would be no occasion,  
20 for Alper would not have any environmental  
21 problems. If there were any environmental  
22 issues, they would be at the subsidiary  
23 level. Nick is nothing more than of a  
24 direct employee for Alper Holdings for  
25 convenience. That is where the payroll

0087

1  
2 and benefits and withholding is. He is  
3 loaned out as needed to various  
4 subsidiaries.

5 Q. And just so I am clear, other than  
6 your understanding as to who Nick Bauer

Bertellotti

7 was working for, was there any document or  
8 any other -- well, was there a document  
9 memorializing when Nick Bauer was working  
10 for, in your mind, a subsidiary as opposed  
11 to working in his capacity as an employee  
12 of Alper?

13 MR. SCOTT: Object to the  
14 form.

15 BY MR. STEWART:

16 Q. Go ahead and answer.

17 A. Document memorializing, such as  
18 time records or like a lawyer might keep?

19 Q. That would be an example.

20 A. Not to my knowledge. I think it  
21 was quite obvious because he was spending  
22 so much time -- of his time with respect  
23 to Saltire. That is where he was spending  
24 his time.

25 Q. Was it understood when he was  
0088

1 working, in your mind, as a lone servant  
2 and when he was not?

3 A. He was hired specifically -- in  
4 effect, specifically for the purpose -- if  
5 it wasn't for Saltire's environmental  
6 issues, Nick Bauer wouldn't have been  
7 hired. He was hired for the purpose of  
8 dealing with Saltire's environmental  
9 issues. The payroll, the benefits,  
10 withholding of taxes; all that done -- was  
11 done at the Alper Holdings level. Saltire  
12 did not maintain its own employee benefit.

13 It, Alper, was making a holding --  
14 making investments. It was also agreed we  
15 would utilize his services on an as-needed  
16 basis to address other environmental  
17 problems that may arise at other  
18 subsidiaries, also. The intended purpose  
19 was primarily to deal with Saltire. And  
20 there's other documents. I mean, if you  
21 were simply to look at his correspondence  
22 files over the years, you would find  
23 virtually all his correspondence relates  
24 to Saltire activities.  
0089

1  
2 There may not be time records but  
3 there are other type of records that would  
4 indicate his role almost exclusively with  
5 Saltire.

6 Q. But when he would work for a  
7 different subsidiary, how would that be  
8 memorialized?

9 A. Only in the context of whatever  
10 records he created in that process.  
11 Whether he was conducting, for example, a  
12 Phase 1 environmental survey with some  
13 acquisition, possibly, or something to  
14 evidence the time he spent there.

15 Q. Basically, if he wrote a document  
16 relating to an entity, would you then  
17 assume that time was exclusively devoted

Bertellotti

18 to that entity?

19 A. Yes.

20 Q. If he called you about a particular  
21 entity, would you just assume, therefore,  
22 he was working on behalf of that entity?

23 A. If he calls specifically regarding,  
24 for example, activities of Alper Ink  
25 Group, if he had a reason to call me -- I

0090

1 don't recall that he did -- yes, he would  
2 be working with respect to some issue  
3 regarding the Alper Ink Group.

4 Q. Was Nick Bauer authorized to file  
5 documents with environmental authorities  
6 without review by either you or Mr. Smith  
7 or someone else at the headquarters?

8 MR. LUCAS: What kind of  
9 documents, Mike?

10 MR. SCOTT: What  
11 headquarters? I would object to  
12 the form.

13 MR. STEWART: That is an  
14 objection to the form?

15 MR. SCOTT: Object to the  
16 form.

17 BY MR. STEWART:

18 Q. I think you can answer the question  
19 and make it clear.

20 A. I can answer it. We made -- ever  
21 since 1995, every year during the annual  
22 elections, Nick is elected officer of  
23 Saltire, vice-president of environmental  
24 affairs, specifically giving him the

0091

1 authority to bind the corporation, to  
2 engage in negotiations on behalf of the  
3 corporation. I would say more often than  
4 not, Nick may enter into agreements or  
5 make decisions with respect to certain  
6 environmental issues on his own. If they  
7 raise to a certain level, if they are a  
8 certain magnitude, certain complexity, he  
9 may very well call us. Certain things  
10 regarding settlements, for example.

11 Q. Would you have expected a  
12 settlement to be run through you and  
13 approved by you?

14 A. Yes, he would call Wayne and I as  
15 senior officers of Saltire to discuss  
16 settlement issues.

17 Q. Would you have expected a  
18 document -- a report filed with the  
19 Environmental Protection Agency relating  
20 to a contaminated site to be run by you or  
21 Mr. Smith prior to its filing?

22 A. If it was of a certain magnitude,  
23 certainly, although my understanding is  
24 there hasn't been any of that type of

0092

1 activity in the last few years. Most of  
2



Bertellotti

3 these sites are subject to consent orders  
4 and agreements that were reached some time  
5 ago.

6 Q. When you say magnitude, what  
7 magnitude?

8 A. There is no specific hard and fast  
9 rule. It's a judgment issue as to the  
10 amount of money involved. Routine  
11 contracts to continue monitoring, to  
12 engage in some type of remediation, he  
13 would enter into. He would review some of  
14 that stuff and another thing, if it was  
15 relatively routine. If not on a scale and  
16 scope he felt necessary to discuss with  
17 us, he had the necessary authority to bind  
18 the corporation and take actions that he  
19 thought were in Saltire's interest.

20 Q. Did he have the authority to hire  
21 and fire without your approval?

22 A. Absolutely not. Hire and fire  
23 employees, well, in the sense of  
24 employees --

25 Q. Yes?

0093

1 A. No.

2 Q. Did he have the authority to hire  
3 and fire independent contractors without  
4 your approval?

5 A. He could have done that. I think  
6 again, in any material instance, he would  
7 discuss that with us also.

8 Q. Was he entitled to make -- to take  
9 on, develop new strategies regarding  
10 environmental sites without your approval  
11 or input?

12 A. He would develop -- I mean, he is a  
13 very skilled engineer with a long history  
14 of involvement in environmental issues, so  
15 we defer to Nick's judgment in terms of  
16 the scope of the investigation, evaluating  
17 remediation alternatives, and he is the  
18 one that would come up with strategies,  
19 alternatives. He would make  
20 recommendations to us. We would defer to  
21 his judgment. Again, he is a very skilled  
22 engineer.

23 Q. But with regard to those kinds of  
24 decisions, is it your testimony he would  
25

0094

1 refer those to you for approval or review  
2 before execution?

3 A. In most instances, to the extent  
4 they are material, I would say yes. But  
5 again, there hasn't been that much  
6 activity in the last few years. There are  
7 instances where there are substantial  
8 things going on and he reviews us to,  
9 throughout the scope of the remediation,  
10 the type of things going on. So he does  
11 bring that to our attention.

12 Q. Did Nick, Nick Bauer, his  
13

Bertellotti

14 activities -- strike that.

15 Was Nick Bauer, during the time he was  
16 an employee of Alper Holdings USA, Inc.,  
17 ever supervised by a human being who was  
18 not an officer of Alper Holdings USA,  
19 Inc.?

20 A. Probably not. But again, the point  
21 being -- people, he was supervised by  
22 people -- you clearly understand the dual  
23 role.

24 There are people at Alper Holdings  
25 USA, Inc. who are also officers of Saltire

0095

1 Industrial; and so to the extent he's  
2 being supervised with respect to Saltire's  
3 affairs, he's being supervised by somebody  
4 who may be a direct employee of Alper but  
5 is also a senior officer, above Nick, of  
6 Saltire Industrial. That's the context in  
7 which he's being supervised.

8 Q. Does -- I think you mentioned an  
9 annual meeting.

10 When would Alper hold its annual  
11 meeting?

12 MR. SCOTT: Alper would  
13 be --

14 THE WITNESS: Alper  
15 Holdings.

16 BY MR. STEWART:

17 Q. Alper Holdings USA, Inc.

18 A. The meeting doesn't take place in  
19 the sense of a physical meeting. The  
20 meetings take place in the sense they are  
21 a written consensus. Unanimous written  
22 consensus.

23 Q. Does it occur at the same time  
24 every year?

0096

1 A. Occurs roughly the same time every  
2 year.

3 Q. When is that?

4 A. I believe it's in the spring.

5 Q. Could you be more specific?

6 A. I can't.

7 Q. When does, or does Saltire hold a  
8 stockholders/shareholders meeting?

9 A. Yes, it does.

10 Q. When is that held?

11 A. It's held -- most of the  
12 corporations are held at the same time,  
13 generally, orchestrated by the legal  
14 department. Obviously I sign certain  
15 documents associated with this, but the  
16 legal department knows what the calendar  
17 is and annual election is and when things  
18 are due.

19 Q. Now, at the shareholders meeting,  
20 are directors elected for Alper Holdings  
21 USA, Inc.?

22 A. Yes.

23 Q. And do the shareholders elect the

Bertellotti

25 officers of the company of Alper Holdings  
0097

1

2

USA?

3

A. The shareholders?

4

Q. Yes.

5

A. They do not.

6

Q. Do the directors elect the

7

officers?

8

A. Directors appoint the officers of  
9 the corporation, Alper Holdings USA.

10

Q. And how long have you been familiar  
11 with how the shareholder and directors --  
12 shareholders and directors meetings were  
13 orchestrated at Alper Holdings USA, Inc.?

14

MR. LUCAS: Object to the  
15 form of the question.

16

BY MR. STEWART:

17

Q. Let me rephrase. We have talked  
18 about directors meetings or shareholders  
19 meetings held by Alper Holdings USA, Inc.

20

How long have you been familiar  
21 when those meetings were held and how  
22 held?

23

A. I have certainly been involved as  
24 an officer/director since 1997.

25

Q. And does that -- is your knowledge

0098

1

of that corporate governance -- does it  
2 encompass the years 1997 forward for  
3 Saltire Industrial as well?

4

A. Yes, it does.

5

Q. Now, do you know whether Alper  
6 Holdings USA, Inc. has held a special  
7 directors meeting other than the annual  
8 meeting -- let me step back for a minute.

9

Do the directors hold their  
10 meetings, a single meeting each year, at  
11 the same time that the shareholders hold  
12 their meeting?

13

A. Not necessarily.

14

Q. When do the Alper Holdings USA  
15 directors meet?

16

A. There is no routine schedule.

17

Q. How many times a year do they meet?

18

A. It would depend on the given year  
19 and what the activities of the corporation  
20 are. Generally meet in the context of  
21 some event or corporate activity that  
22 requires it. But again, it depends on the  
23 year. We have had, some years, many more  
24 meetings than others.

25

0099

1

Q. Well, when do they appoint the  
2 officers of the corporation?

3

A. At the same time, approximately the  
4 same time, that the directors were  
5 appointed. The annual elections are made  
6 about the same time.

7

Q. Do the directors of Saltire  
8 Industrial, Inc. meet at the same time

9

Bertellotti

10 that the shareholders do?

11 A. Which shareholders?

12 Q. When do the directors of Saltire  
13 Industrial meet to appoint the officers of  
14 Saltire Industrial?

15 A. Again, it's generally relatively  
16 early in the calendar year. When the  
17 legal department orchestrates these things  
18 or outside counsel, if necessary, sets  
19 them.

20 Q. Does Saltire Industrial -- do  
21 Saltire Industrial directors or director  
22 meet at the same time and appoint officers  
23 on roughly the same date that the annual  
24 shareholders meeting's held?

25 A. Yes. I mean, in a sense, that's  
0100

1 the purpose of it. If you are talking  
2 about the annual shareholders meeting,  
3 it's held in order to appoint the  
4 directors.  
5

6 Q. And then at that same time, do the  
7 directors then appoint the officers?

8 A. It would be approximately the same  
9 time, is my recollection.

10 Q. Are the directors of Saltire  
11 Industrial, Inc. paid?

12 A. They are not.

13 Q. Are the directors of Alper Holdings  
14 USA paid?

15 A. They are not. They were paid at  
16 some point in the early '90s, although  
17 that was cut off in the mid-'90s.

18 Q. Do you know when it was cut off?

19 A. 1996 or 1997.

20 Q. Why was it cut off?

21 A. The board was, in effect,  
22 reconstituted in 1997 and we decided to  
23 terminate those payments.

24 Q. What were the payments prior to  
25 that time?

0101

1  
2 A. The amounts?

3 Q. Yes?

4 A. I believe they were \$30,000  
5 annually per director.

6 Q. Okay. Prior to 1997, who were the  
7 board members of Alper Holdings USA, Inc.?

8 A. Prior to 1997, they would have been  
9 Nicholas Combemale, Ernesto Canales, and  
10 Alberto Geociatucci.

11 Q. How long did they serve as the  
12 directors of Alper Holdings USA, Inc.?

13 A. To my knowledge, it would have been  
14 approximately 1993 to mid-1997.

15 Q. Do you know who served as its  
16 directors prior to 1993?

17 A. I do not.

18 Q. Post-'97, who served as the  
19 directors of Alper Holdings USA, Inc.?

20 A. Luis Felipe Gonzalez; Luis Felipe

Bertellotti

21 Sanchez; Victor Barreiro, B-a-r-r-e-i-r-o;  
22 and Rodolfo Garcia.

23 Q. Are these currently the directors  
24 of Alper Holdings USA, Inc.?

25 A. Yes, they are.

0102

1

2 Q. They have been the directors --  
3 have they been the directors since 1997?

4 A. There may have been one -- no, Luis  
5 Felipe Sanchez probably was added in 1998  
6 or 1999.

7 Q. Is the office of vice-president of  
8 environmental affairs specifically  
9 referenced in Alper Holdings USA, Inc.'s  
10 charter?

11 A. Not to my knowledge.

12 Q. Is the office of vice-president of  
13 environmental affairs specifically  
14 referenced in Alper Holdings USA's  
15 incorporation bylaws?

16 A. Not to my knowledge. I don't know  
17 is really a better answer. I simply don't  
18 know.

19 Q. Does Alper Holdings USA, Inc. have  
20 bylaws?

21 A. Yes, it does.

22 Q. And where can those be found?

23 A. In our offices.

24 Q. Would that be the best place to  
25 look to answer that question?

0103

1

2 A. Yes.

3 Q. Have the bylaws been amended since  
4 1993 when you have been at the company?

5 A. I would have to consult with the  
6 general counsel.

7 Q. Can you recall an amendment?

8 A. I don't recall.

9 Q. In your mind, has the structure of  
10 Alper Holdings USA changed, that you would  
11 think the bylaws had been amended at that  
12 time?

13 A. You are talking very specific legal  
14 issues regarding things that I don't have  
15 an intimate familiarity with as president.  
16 Specifically, that's why we generally  
17 always had in the position of general  
18 counsel as many as two lawyers on the  
19 staff. That's why we generally refer  
20 these people to outside counselors to  
21 address these issues.

22 Q. I take it -- well, have minutes  
23 been taken at all of the shareholders  
24 meetings since 1993 for Alper Holdings  
25 USA, Inc.?

0104

1

2 A. To the extent minutes were  
3 required, yes.

4 Q. To the extent minutes are required,  
5 have they been taken at directors meetings

Bertellotti

6 since 1993 when you arrived at the  
7 company?

8 A. I believe so.

9 Q. Have minutes of directors meetings  
10 and of shareholders meetings been taken to  
11 the extent required at Saltire director  
12 and shareholder meetings?

13 A. That is standard practice.

14 Q. So the answer is yes?

15 A. Yes.

16 Q. Is the office of vice-president of  
17 environmental affairs specifically  
18 referenced in the charter of Saltire  
19 Industrial, Inc.

20 A. Without reviewing that document, I  
21 don't know. If it's required by law, I  
22 assume it is. I assume general counsel  
23 would have modified that to reflect that,  
24 if it's required.

25 Q. Do you know if the office of

0105

1 vice-president of environmental affairs is  
2 specifically referenced in the bylaws of  
3 Saltire Industrial, Inc.

4 A. I do not know, sitting here.

5 Q. To answer that question, would you  
6 want to refer to the charter and bylaws of  
7 Saltire Industrial, Inc.

8 A. Yes.

9 MR. SCOTT: Object to the  
10 form.

11 BY MR. STEWART:

12 Q. Are those located at the company?

13 A. Yes, they are.

14 Q. Did you say that Nicholas Bauer is  
15 appointed to the vice-president of  
16 environmental affairs by the board of  
17 directors of Alper Holdings USA, Inc.?

18 A. No, I did not say that.

19 Q. Who does appoint him?

20 A. Vice-president of environmental  
21 affairs of Saltire.

22 Q. Of Alper Holdings?

23 A. Repeat the whole question. I maybe  
24 misunderstood you.

0106

1 Q. Who appoints Alper Holdings USA  
2 Inc.'s vice-president of environmental  
3 affairs?

4 A. Alper's board of directors.

5 Q. And who appoints Saltire  
6 Industrial, Inc.'s vice-president of  
7 environmental affairs?

8 A. Saltire's board of directors.

9 Q. Has that been true since 1993 when  
10 you joined Alper Holdings USA, Inc.?

11 A. Again, Mr. Stewart, from 1993 to  
12 1997 I wasn't involved in the corporate  
13 governance issues. But Nick Bauer joined  
14 in 1995 and I have seen indications that  
15 each year since 1995, Saltire's board of

Bertellotti

17 directors appointed Nick Bauer  
18 vice-president of environmental affairs of  
19 Saltire. So since 1995, I believe that is  
20 true.

21 Q. Have you seen those documents  
22 recently?

23 A. I have not seen them in months.

24 Q. And have you seen them in  
25 connection with reviewing the briefs filed

0107

1  
2 in this case?

3 A. I don't recall looking. I believe  
4 I asked somebody who works for me to look  
5 at it, but I didn't specifically review  
6 it. But I believe it could be true.

7 Q. Who did you ask to look at it?

8 A. Mr. Smith.

9 Q. And did you talk to him about that?

10 A. Yes, sometime in the course of the  
11 last five or six months.

12 Q. About what those documents said?

13 A. Yes. Again, you are asking  
14 questions over a long period of time.

15 Q. Well, the question I am asking,  
16 though, did you and Mr. Smith talk about  
17 the records relating to Mr. Bauer's  
18 appointment as vice-president of  
19 environmental affairs?

20 MR. SCOTT: When?

21 MR. LUCAS: When?

22 BY MR. STEWART:

23 Q. Have you discussed that with  
24 Mr. Smith?

25 A. Only in passing.

0108

1  
2 Q. Have you discussed it within the  
3 past four months in connection --

4 A. I believe we discussed it once in  
5 the last five months.

6 Q. What was that in connection with?

7 A. We were just verifying precisely --  
8 I didn't remember specifically when

9 Mr. Bauer joined the company, whether it  
10 was '94, '95, or '96, and we were  
11 verifying what year he joined and what  
12 year he was made vice-president of  
13 environmental affairs of Saltire.

14 Q. He got that information -- did he  
15 get that information from the corporate  
16 documents you referred to?

17 A. Yes.

18 Q. Under the bylaws of Alper Holdings  
19 USA, Inc., are there any particular  
20 activities that must be approved by the  
21 board of directors?

22 A. I would have to refer to the  
23 specific bylaws.

24 Q. You would have to look at the  
25 bylaws?

0109

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Bertellotti

2 A. I would have to look at the bylaws.  
3 Q. For Saltire, are there any specific  
4 activities that must be approved by the  
5 board of directors?

6 A. There may be, but would I need to  
7 review the specific bylaws.

8 Q. You talked about directors meetings  
9 for Alper Holdings USA, Inc.

10 A. Yes.

11 Q. Tell me the directors meetings that  
12 have been held this year.

13 A. To my knowledge, it was just one.  
14 That would be to make the annual election  
15 of the officers.

16 Q. How about in 2002?

17 A. There would certainly have been the  
18 annual election of the officers.

19 Q. Can you remember any special  
20 meetings?

21 A. 2002, I don't recall any, sitting  
22 here.

23 Q. How about 2001?

24 A. Again, the annual election.

25 Q. Now, 2000?

0110

1

2 A. Yeah.

3 Q. Tell me about the meetings of the  
4 board of directors of Alper Holdings USA,  
5 Inc. that occurred in 2000.

6 A. Mr. Stewart, without checking all  
7 the minute books, I couldn't specifically  
8 remember each and every meeting that took  
9 place, whether it was one or more and what  
10 they were. If you have something specific  
11 in mind, ask me.

12 Q. Well, was a meeting held relating  
13 to the sale of Alper Ink?

14 A. Meeting at what level? Certainly  
15 we would have sought shareholder approval.  
16 We -- the practice would have been, again,  
17 if it was required by the bylaws or not.  
18 I can't tell you, sitting here. The  
19 practice would have been -- Saltire  
20 developed its major subsidiary, a  
21 transaction of such scope and magnitude,  
22 we would have thought it prudent to get a  
23 shareholder resolution on that standard  
24 governance. You see it all the time in  
25 the public sector; people getting approval

0111

1

2 for stock option plans, mergers, and major  
3 divestitures.

4 Q. For that, you get a shareholder  
5 approval?

6 A. Yes. If it's a scope of magnitude,  
7 we go to the shareholders, more often than  
8 not. It doesn't happen very often  
9 officially.

10 Q. Can you think of any time when you  
11 have gone to the shareholders of Alper  
12 Holdings USA, Inc. in 2001 to 2003?



Bertellotti

13 A. It's probable you are aware of the  
14 \$25 million loan that was made to Grupo  
15 IUSA. It's probable -- again, without  
16 having the records to late 2000/2001 in  
17 front of me, it's probable we reviewed --  
18 we viewed that as loaning a large sum of  
19 Saltire's assets; and we would have, as I  
20 said, with all probability, high degree of  
21 certainty, we would have requested a  
22 shareholder approval on that. Again, the  
23 transaction being such in scope and  
24 magnitude that we wanted shareholder  
25 involvement.

0112

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2

Q. Would you have requested  
shareholder approval of the sale of Alper  
Ink?

5

A. I believe -- didn't we talk about  
that a minute ago?

7

Q. I want to make sure I am clear.

8

A. Yeah, I believe so.

9

MR. SCOTT: For the court  
reporter, it's spelled Alper Ink,

11

12

I-n-k.

12

BY MR. STEWART:

13

14

Q. Does the divestiture of Alper  
Development have been the sort of activity  
that would have -- that you would have  
sought shareholder approval of?

16

17

A. That in a way predates -- the  
decision to divest Alper Development, Inc.  
predates my position of an officer,  
although I was clearly involved in the  
subsequent, so that decision being made, I  
don't know. It seems possible, maybe  
likely, that would be the type of  
transaction that sought shareholder  
approval, but I wasn't involved.

25

0113

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2

Q. Who is the shareholder of Alper  
Holdings USA, Inc.?

4

A. It has two corporate shareholders.

5

Q. Who are they?

6

A. I don't know the name off the top  
of my head. I would have to review  
records.

8

9

Q. What records would you review?

10

A. I would probably look at the stock  
registry. I just don't know. I could  
find it easily enough. I don't know the  
names off the --

12

13

Q. Do you know who Grupo IUSA is?

14

A. It's not -- it's not a  
shareholder -- direct shareholder of Alper  
Holdings.

16

17

Q. Is it an indirect holder of Alper  
Holdings?

18

19

A. I don't believe.

20

Q. Is Carlos Peralta a direct

21

shareholder of Alper Holdings?

22

A. Common knowledge -- commonly

23

Bertellotti

24 believe that he is, although I have not  
 25 seen any certificates or anything  
 0114  
 1  
 2 evidencing his ownership or his  
 3 percentage.  
 4 Q. Is that your understanding?  
 5 A. Yes.  
 6 Q. Has that been true during the time  
 7 that you have been at Alper?  
 8 A. I know that at one point in time  
 9 his father was a shareholder.  
 10 Q. Is that Alejo Peralta?  
 11 A. His father is passed away. Carlos'  
 12 father passed away, but his name was  
 13 Alejo, yes. You spoke of Alejo with  
 14 regard to the CashX board of directors.  
 15 Q. Since you became president has  
 16 Carlos been -- to your knowledge, Carlos  
 17 Peralta's primary indirect shareholder of  
 18 Alper Holdings?  
 19 A. I am sure, although I haven't seen  
 20 anything evidencing his ownership.  
 21 Q. When you talk about seeking  
 22 shareholder approval, would you talk  
 23 directly with Carlos Peralta about those  
 24 decisions?  
 25 A. No.

0115  
 1  
 2 Q. Who would you talk to? How are  
 3 shareholders' approval sought?  
 4 A. For Saltire?  
 5 Q. For Alper Holdings USA, Inc.  
 6 A. There's contact with the corporate  
 7 shareholders.  
 8 Q. What human being is contacted? How  
 9 are they contacted?  
 10 A. By telephone call.  
 11 Q. Well, who would make such a contact  
 12 to tell them about, say, the Alper Ink  
 13 deal?  
 14 A. You are making a mistake in your  
 15 assumptions. You are assuming --  
 16 Q. Please correct me.  
 17 A. You are assuming that what I  
 18 specifically said -- maybe I misspoke, I  
 19 don't think I did.  
 20 What I specifically said, if  
 21 Saltire decided to sell Alper Ink, if  
 22 Saltire Industrial decided to sell its  
 23 subsidiary of Alper Ink, it would ask for  
 24 its shareholder approval, which is Alper  
 25 Holdings. It would never go further than

0116  
 1  
 2 that.  
 3 Q. Okay, let's get back. So, for  
 4 Alper Holdings USA, Inc. for the year  
 5 2000, how many special -- how would I find  
 6 out how many special directors meetings  
 7 were held?  
 8 A. For Alper Holdings, we would have

Bertellotti

9 to refer to the minute books.

10 Q. And are you saying now that Alper  
11 Holdings USA, Inc. -- and to your  
12 knowledge, has Alper Holdings USA, Inc.  
13 sought shareholder area approval for any  
14 action since the year 2000?

15 MR. SCOTT: Object to the  
16 form of the question.

17 BY MR. STEWART:

18 Q. Go ahead and answer.

19 A. Is Alper -- let me repeat, has  
20 Alper Holdings USA, Inc. ever sought  
21 shareholder approval with respect to any  
22 action?

23 Q. Right.

24 A. I believe only with respect to the  
25 appointment, the selection of board of

0117  
1 directors.

2  
3 MR. SCOTT: Could we crack  
4 one of the doors a little more?

5 BY MR. STEWART:

6 Q. Saltire Industrial, Inc. Have any  
7 special board meetings been held by  
8 Saltire Industrial, Inc.'s board from 2000  
9 to present?

10 A. 2000 to the present, I would say  
11 yes. Certainly with respect to the sale  
12 of the Alper Ink Group. Obviously the  
13 election -- you are making the distinction  
14 between special and routine.

15 Q. Yes?

16 A. Special, meaning not the annual.  
17 Certainly there would have been a board  
18 resolution authorizing the sale.

19 Q. And I think -- did you just say  
20 that resolution would have occurred after  
21 Alper Holdings gave its approval?

22 A. Yeah, that's right.

23 Q. I am going to --  
24 (Whereupon Exhibit 7 is  
25 Marked.)

0118  
1  
2 BY MR. STEWART:

3 Q. Do you recognize this document?

4 A. I do.

5 Q. What is it?

6 A. It's the management agreement.

7 Q. If you look at it, it's an accurate  
8 copy of the management agreement?

9 A. It's certainly accurate as of 1995.  
10 It's possible it's been amended since  
11 then, but I suspect it's probably very  
12 consistent.

13 Q. Do you know if it's been amended  
14 since then?

15 A. Off the top of my head, I do not.

16 Q. All right. Do you see a statement,  
17 whereas Alper Holdings is in the business  
18 of providing such services? That's the  
19 third paragraph.

Bertellotti

20 A. Yes.

21 Q. You see, whereas the companies  
22 require certain management supervisory and  
23 advisory services. Do you see that?

24 A. Where are you looking?

25 Q. The first -- second paragraph?

0119

1

2 A. I see it. Got it.

3 Q. Is this -- are those two  
4 statements, combined with the companies in  
5 the first paragraph, an accurate  
6 description of what Alper's business is?

7 A. Not in its entirety, no.

8 Q. What other businesses does Alper  
9 have, other than providing services to  
10 related entities?

11 A. Well, first and foremost, I think a  
12 traditional holding company is set up and  
13 designed specifically to hold interests in  
14 other companies, to manage in the sense of  
15 monitor, supervise, evaluate the various  
16 businesses that it owns. I think that is  
17 first and foremost of its role, and  
18 depending on the nature of the business,  
19 it may or may not provide services to the  
20 extent there seems to be efficiency or  
21 benefit in doing so. First and foremost,  
22 it's a traditional holding company.

23 Q. Let's turn back to your affidavit  
24 that is Exhibit 2.

25 Now do you see paragraph -- I will say  
0120

1

2 the second paragraph, Number 1 on your  
3 affidavit?

4 A. Yes.

5 Q. Prior to 1993, any personal  
6 involvement with any of the activities  
7 described here?

8 A. Prior to 1993, what are you calling  
9 activities?

10 Q. Any personal involvement with  
11 Saltire or any of the activities that are  
12 stated on your affidavit, Paragraph 1?

13 A. No, no personal activity.

14 Q. Okay. For Paragraph Number 2, did  
15 you have any personal involvement with the  
16 transaction you describe in Paragraph 2?

17 A. No. I am not familiar with the  
18 documents, but not -- I was not directly  
19 involved.

20 Q. Did you have any personal  
21 involvement with the divestiture and other  
22 activities that you described in Paragraph  
23 3?

24 A. I did not have any personal  
25 involvement, although I have personal

0121

1

2 knowledge of those divestiture agreements  
3 and what they represent.

4 Q. Is your personal knowledge based on

Bertellotti

your reading of the divestiture agreements themselves?

A. I have had occasion to familiarize myself with certain sections of the divestiture agreements.

Q. Are -- is there any other source of your knowledge for the activities in Paragraph 3 other than those divestiture agreements?

A. Well, I have personal knowledge. I mean, we are still administering, funding a lot of these liabilities, these legacy liabilities. Clearly we have personal involvement that exists and continues to this day.

Q. Do you know whether any liabilities for environmental contamination that had been Scovill's liability based on historical activities were transferred to other entities as part of the divestitures described in Paragraph 3?

MR. SCOTT: Object to the form.

BY MR. STEWART:

Q. Go ahead and answer the question.

A. With respect to these specific -- yeah, we have one, I believe, one set of -- repeat the question, please.

Q. I am. You mentioned a bunch of divestitures?

A. Yeah.

Q. In Paragraph 3; do you see that?

A. Yes.

Q. And there were divestitures of Saltire subsidiaries based on divestiture agreements, is that?

A. That's correct, and they retain certain liabilities I got.

Q. Were there any divestitures -- were any divestiture made to your knowledge which Saltire did not retain liabilities for any environmental contamination created by the developed entity?

A. I don't think so. I believe with the sale of Scovill Fasteners, which

occurred much later than what we are referring to, occurred in 1995 I believe, we may have divested in that transaction some of Scovill Fasteners' specific liability, but I have to read the representations, warranties, and indemnification agreement to be specific. I think the -- a distinct possibility, we may have transferred some liabilities associated with Scovill Fasteners' operations specifically.

Q. Is that the only instance in which you can recall liabilities passing or being divested with the divestiture of a

Bertellotti

16 Scovill subsidiary?

17 A. It's the only one I am aware of,  
18 sitting here right now.

19 Q. Otherwise, it's your understanding  
20 Saltire Industrial, the renamed Scovill,  
21 retains all of the environmental and the  
22 contamination liabilities from all the  
23 activities described in Paragraph 1 of  
24 your affidavit?

25 A. Paragraph 1? You mean Paragraph 3?

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Q. I am referring to Paragraph 1,  
3 Number 2. The second Paragraph 1 on Page  
4 1.

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MR. LUCAS: Can you repeat  
the question?

7

8

MR. STEWART: I think that  
is fair.

9 BY MR. STEWART:

10 Q. It's just a simple question. I  
11 want to make sure I understand. Other  
12 than Scovill Fasteners, you don't have any  
13 other instance in which Scovill or Saltire  
14 divested a subsidiary but did not retain  
15 the environmental liabilities?

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A. I am not aware of any. You are  
making an absolute statement, and without  
reviewing those documents line by line and  
vetting all of the reps and warranties and  
indemnification provisions, I wouldn't  
make a statement like that. My general  
recollection, they maintained the vast  
majority if not all of the liabilities  
associated with the former operations.

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Did you have any involvement with  
the pre-packaged Chapter 11 bankruptcy?

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A. I did not have any direct  
involvement with it, although I have  
reviewed certain documents and have gained  
certain personal knowledge of the certain  
aspects of the bankruptcy.

10

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15

MR. STEWART: Make this  
whatever the next Exhibit is.

(Whereupon Exhibit 8 is  
Marked.)

(Whereupon a Recess is  
Taken.)

16 BY MR. STEWART:

17

18

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Q. Do you recognize the document in  
front of you?

A. Yes.

Q. What is it?

A. Saltire Industrial, Inc. and  
Subsidiaries, Independent Auditors' Report  
for fiscal year December 31, 2000 and  
1999.

25

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Q. Could you briefly turn to Page 12?

Bertellotti

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A. Yes.  
Q. Do you see the related-party transactions?  
A. Yes, I do.  
Q. Tell me what were the management and advisory fees for 2000 paid by Saltire to Alper Holdings USA, Inc.  
A. Shows four and a half million dollars.  
Q. Now, can you look at the management agreement which is also in Exhibit --  
MR. SCOTT: Seven.  
BY MR. STEWART:  
Q. -- 7?  
A. Yes.  
Q. Can you tell me what the \$4.5 million is for, what is called compensation under Part 3 of the management agreement?  
A. Yes, it is.  
Q. Okay. So the \$4.5 million, that's the management and advisory fees for 2000 on Exhibit 8?  
A. That's correct.

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Q. Does that \$4.5 million include any direct expenses as set out in Paragraph 2 of the management agreement?  
A. Yes, it would cover the direct expenses, as well. I don't think we make a separate billing for the direct expenses. But let me finish reading this, though. (Reading.)  
Q. Take your time.  
A. Go ahead.  
Q. Well, would that 4 -- now that you have looked at Part 2, would direct expenses be included in this \$4.5 million figure for 2000?  
A. To the extent -- the way I read this, to the extent Alper Holdings incurs direct expenses, out-of-pocket expenses, for all direct out-of-pocket expenses reasonably incurred by Alper Holdings in connection with his performance of responsibilities to such companies, I don't believe the four and a half million dollars would include these direct expenses. And I also don't believe there

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are a lot of direct expenses that meet this definition that we would seek reimbursement for.  
Q. But the \$4.5 million, it would include the compensation that is set out in Part 3 of the management agreement, which is --  
A. Yeah.  
Q. Which is Exhibit 7.  
A. In respect to the management issues

Bertellotti

12 listed as A through G on Pages 1 and 2.

13 Q. Can you tell me, looking at Page 12  
14 of the financial statement that is Exhibit  
15 8, what the director -- what the  
16 compensation and the management agreement  
17 paid by Scovill for 1999 was?

18 A. \$4.5 million.

19 Q. So did we have a payment of \$4.5  
20 million in '99, and then another payment  
21 of \$4.5 million in 2000?

22 MR. SCOTT: Object to the  
23 form.

24 BY MR. STEWART:

25 Q. Let me rephrase. I think we can  
0129

1 address the objection.

2 Did we have payments totaling \$4.5  
3 million for 2000, management advisory  
4 fees; and then another set of payments  
5 totaling \$4.5 million for '99?

6 A. Yes, it appears that way. These  
7 are probably accrual numbers. Whether the  
8 payments were actually effected in that  
9 year is also hard to say. I think you are  
10 talking whether there was accrual for  
11 management fees of those amounts in those  
12 years, and I think the answer is yes.

13 Q. \$4.5 million accrued in 2000, and  
14 then another \$4.5 million accrued in 1999?

15 A. That's correct.

16 Q. Let's turn back to your affidavit.  
17 Do you see Paragraph 7 in that affidavit,  
18 where it says Alper was compelled to  
19 exchange its debt for 55 percent of the  
20 common stock in the First City?

21 A. Yes.

22 Q. At the time of that transaction,  
23 were you personally involved with Alper?

24 A. That was in October, November of  
0130

1 1992. No, I was not.

2 Q. Did you have any direct involvement  
3 with that transaction?

4 A. I did not have any direct  
5 involvement with it but I have knowledge  
6 of that transaction.

7 Q. And what is your knowledge based  
8 on?

9 A. Review of certain of the documents  
10 associated with that transaction, as well  
11 as discussions with lawyers and business  
12 people who did have some direct  
13 involvement.

14 Q. What documents are you referring  
15 to?

16 A. It would be the bankruptcy plan of  
17 reorganization and plan of confirmation.

18 Q. For all these activities that  
19 occurred before you got to Alper, would  
20 you defer to statements made by officers  
21 and directors of Alper -- let me rephrase  
22



Bertellotti

23 that.

24 As between your understanding and  
25 the understanding of an officer or

0131

1  
2 director of Alper who was personally  
3 involved with the events described in  
4 Paragraph 7?

5 A. Hm-hm.

6 Q. Who would you believe would have  
7 the more accurate personal knowledge?

8 MR. LUCAS: As to what?

9 THE WITNESS: As to what,  
10 exactly?

11 BY MR. STEWART:

12 Q. The events in Paragraph 7 that you  
13 described in your affidavit.

14 MR. SCOTT: I also object  
15 to the form of the question.

16 MR. LUCAS: Object --

17 excuse me, I didn't mean to  
18 interrupt. Go ahead. I object  
19 to it as overly broad.

20 THE WITNESS: To the extent  
21 people were directly involved in  
22 the bankruptcy, it's lawyers  
23 drafting the documents. They  
24 would clearly have more  
25 exhaustive personal knowledge

0132

1  
2 than I have.

3 I have never represented  
4 that I understand all of the  
5 intimate and painstaking details  
6 of bankruptcy. I do understand  
7 certain aspects of it. I  
8 understand when it occurred. I  
9 understand how it came about to  
10 have our equity interest and  
11 those type of things, I know.

12 I reviewed the documents; I  
13 have seen those figures; I know  
14 those things happened, but I  
15 don't have an intimate knowledge  
16 of all the details of a very  
17 complex bankruptcy.

18 BY MR. STEWART:

19 Q. For periods before September of  
20 1993, would Nick Combemale have knowledge  
21 of Alper Holdings USA's activities as  
22 compared to your knowledge?

23 MR. LUCAS: Object to form  
24 of the question as overly broad.

25 MR. SCOTT: Also requires

0133

1  
2 speculation of somebody's else's  
3 knowledge and recollection and so  
4 forth.

5 BY MR. STEWART:

6 Q. Just answer the question.

7 A. Can you be more specific in terms

Bertellotti

of regarding, what, the bankruptcy?

Q. Can you think of a single subject relating to Alper Holdings USA, Inc.'s activities prior to 1993 in which your knowledge of those activities would be superior to those of Nicholas Combemale?

MR. SCOTT: Again, object to the form of the question.

BY MR. STEWART:

Q. Go ahead and answer.

MR. LUCAS: Same objection.

THE WITNESS: Not to be difficult, but just phrase it again. Or repeat the same question; just let me listen carefully.

BY MR. STEWART:

Q. I want to know if you can think of

0134

any activities conducted by Alper Holdings USA, Inc. that occurred before September of '93 that would be more familiar to you than to Nicholas Combemale?

MR. SCOTT: Object to the form of the question.

BY MR. STEWART:

Q. Go ahead and answer.

A. Just sitting here, I can't speculate as to what Mr. Combemale knows and what he doesn't know. It would be completely guessing. I don't know what Mr. Combemale knows. He may have slightly incremental knowledge of the bankruptcy and specifics of the bankruptcy, but beyond that, I am not sure what he would know more about.

Q. But I take it, or would you -- there was a legal document that contradicted your affidavit -- strike that.

Who knows more about Alper's legal affairs prior to September of 1993: You or Mr. Coghlin over there?

0135

MR. SCOTT: Objection to the form of the question.

BY MR. STEWART:

Q. Go ahead and answer.

A. I can't speculate to Mr. Coghlin's knowledge.

Q. Tell me how Alper was compelled to exchange his debt for the common stock of First City. How compelled?

A. Well, the word compelled, as used here, simply meant it was a condition of the bankruptcy. Alper was a creditor and held certain bonds. It had no choice but to have the bonds converted. It didn't have a choice of being repaid. Its choice was to take equity, 55 percent of the equity in the company. Compelled in the

Bertellotti

19 context that this is what the Judge  
20 ordered; this is what the Judge approved.  
21 Q. But was Alper -- is it fair to say  
22 Alper voluntarily elected to participate  
23 in the bankruptcy in order to gain control  
24 of First City?

25 A. Again, I was not involved prior to  
0136

1  
2 1992. I don't know what the motives and  
3 intents are. I don't know when they  
4 originally acquired all of the bonds that  
5 led to the conversion. It's a  
6 possibility, but I can't speculate. I  
7 don't have any personal knowledge as to  
8 what the intent was at the time. I simply  
9 know they had data that was converted into  
10 the 55 percent of the equity. As to the  
11 intent, I don't know.

12 Q. The First City referred to in  
13 Paragraph 5 and 7; what First City entity  
14 is that?

15 A. That would be First City  
16 Industries.

17 Q. Okay.

18 MR. SCOTT: Incorporated.

19 THE WITNESS: Incorporated.

20 Specifically, the companies  
21 subject to the 1992 bankruptcy.

22 BY MR. STEWART:

23 Q. And how did Alper become a major  
24 creditor for First City?

25 A. How did Alper become a major  
0137

1  
2 creditor of First City? Alper, you are  
3 referring to who -- Alper is successor to  
4 a couple of companies.

5 Q. Here is what I am referring to.  
6 Paragraph 6, you say Alper, which was  
7 initially incorporated as Alpha  
8 Acquisition Corporation on September 16,  
9 '92, was a large creditor of First City.  
10 Do you see that?

11 A. Yes.

12 Q. Okay. How had Alper Acquisition  
13 Corporation become a large creditor of  
14 First City at that time?

15 A. Without being directly involved, I  
16 would assume they either acquired the  
17 bonds from a third party, or the bonds may  
18 have been contributed to them to  
19 capitalize the corporation from some other  
20 entity which held them prior. Individual,  
21 maybe, I don't know. But one way or the  
22 other, Alper either bought the bonds or  
23 contributed to this part of the  
24 capitalization. That is how it came to  
25 get its interest.

0138

1  
2 Q. What documents would show that  
3 transaction whereby Alpha Acquisition

Bertellotti  
 4 became a large creditor of First City?

5 A. I don't know.

6 Q. Who would know?

7 A. Again, I don't know specifically.

8 There may be some advisor to the Peralta  
 9 family, someone who knows. But I don't  
 10 know.

11 Q. Do you know who conducted due  
 12 diligence to First City on behalf of Alper  
 13 Acquisition Corporation?

14 A. Who conducted due diligence on  
 15 behalf of First City?

16 Q. What human being -- do you know  
 17 what human being was responsible for  
 18 analyzing First City on behalf of Alper?

19 MR. SCOTT: Object to the  
 20 form.

21 MR. LUCAS: For what  
 22 purpose?

23 MR. SCOTT: Object to the  
 24 use of the word First City unless  
 25 we are clearly understanding

0139

1 you are referring to First City  
 2 Industries, Inc. as referred to  
 3 in Paragraph 7 of Mr.  
 4 Bertellotti's affidavit.

5 MR. LUCAS: Are you going  
 6 to clarify what you are asking  
 7 about?

8 BY MR. STEWART:

9 Q. I am going to clarify to these  
 10 myriad objections. We are still talking,  
 11 Mr. Bertellotti, about your sworn  
 12 statements in your affidavit Alper  
 13 Acquisition initially incorporated on  
 14 September 16, 1992 and was a large  
 15 creditor of First City -- First City if  
 16 it's convenient for you -- strike that.  
 17 Let me clean this up.

18 I think you already testified that  
 19 by First City, you meant First City  
 20 Industries, Inc.?

21 A. Subject to the bankruptcy, correct.

22 Q. What I want to know in connection  
 23 with First City -- when Alper Acquisition  
 24 Corporation was becoming a large creditor  
 25

0140

1 of First City, did Alper conduct a due  
 2 diligence into First City's assets and  
 3 liabilities?

4 A. I assume, absolutely, they would  
 5 have.

6 Q. Do you know the human beings that  
 7 would have been involved?

8 A. I believe they hired a financial  
 9 advisor to do so.

10 Q. Who would that have been?

11 A. I think it was a company called  
 12 Valmex International.

13 Q. Why do you think?

14

Bertellotti

15 A. It was a subsidiary of a large  
16 Mexican bank that had a U.S. office, a  
17 brokerage/investment banking arm.

18 Q. Is it your understanding that  
19 Alper -- is it your understanding Alper  
20 analyzed First City and decided from an  
21 investment standpoint to acquire its stock  
22 as part of this bankruptcy?

23 A. I told you, I don't know what the  
24 intent was. Don't know how they came to  
25 acquire the bonds. I remember something

0141

1 about something being called Valmex that  
2 was involved in advising them. But what  
3 the intent was, I simply don't know. I  
4 wasn't involved. I simply don't know what  
5 happened. I know what the result was.  
6 But I can't sit here and speculate as to  
7 the intent.

8  
9 Q. Was -- do you know the human being  
10 that made the decision to make that  
11 acquisition that is described in Paragraph  
12 6 of your deposition -- of your affidavit?

13 A. Specifically, I do not. I suspect  
14 at some level, Peralta family members were  
15 informed. There's a gentlemen named  
16 Roberto Labreha.

17 Actually, I think I can be more  
18 specific. As I sit here, there's a  
19 gentleman named Roberto Labreha who works  
20 in Mexico who was somehow involved in this  
21 decision.

22 Q. You say somehow involved, meaning  
23 he is an advisor?

24 A. He is some type of financial  
25 advisor down there.

0142

1  
2 Q. Works with Carlos Peralta?

3 A. I don't know specifically who he  
4 works for but he is in Mr. Peralta's  
5 organization somewhere in Mexico.

6 Q. Is it your assumption Carlos  
7 Peralta was the decision-maker that  
8 decided to invest in First City by  
9 assuming control?

10 A. Not necessarily.

11 MR. SCOTT: Object to the  
12 form of question.

13 BY MR. STEWART:

14 Q. Who else would have been involved?

15 MR. SCOTT: Just a minute.

16 THE WITNESS: I don't know.

17 MR. SCOTT: Just a minute,

18 please, Bob. Trying to make an  
19 objection here. Object to the  
20 form of that question; totally  
21 mischaracterizes this witness's  
22 prior answer that you tried to  
23 incorporate into the immediate  
24 question. Object to the form.

25 BY MR. STEWART:

Bertellotti

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2 Q. You referred to bonds. What are  
3 bonds are you referring to?

4

5 A. Specifically I can't recite the  
6 specific bonds, the maturity, the interest  
7 rate. I can't do that sitting here.

8

9 Q. Okay. What would you refer to, to  
10 do that?

11

12 A. Plan of reorganization, plan of  
13 confirmation.

14

15 Q. Okay. Who -- do you see you state  
16 in Paragraph 7 Alper was compelled to  
17 exchange its debt for 55 percent of the  
18 common stock of First City?

19

20 A. Yes.

21

22 Q. Who owned the other 45 percent in  
23 October '92?

24

25 A. You mean specifically, I can't  
26 answer. But I know in general it was a  
27 group of institutional investors,  
28 companies like Wellington Management, I  
29 think the State Pension of New York. I  
30 have documents that I can refer to but I  
31 don't have them here with me. It was a  
32 group of institutional investors who

0144

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2 happened to have been -- the reason I know  
3 that, one of the first things I did when I  
4 got to Alper in 1993 was worked on  
5 acquiring the remainder of the stock; and  
6 it was a group of institutional investors  
7 who were generally high-yield-investor  
8 type institutions who held the bonds and  
9 unfortunately, probably for them, had  
10 their debt converted to equity.

11

12 Q. Would these have been investors  
13 that had been creditors of First City  
14 preceding the pre-packaged bankruptcy?

15

16 A. Yeah, clearly. But for how long, I  
17 have no idea.

18

19 Q. And how much did you purchase their  
20 45 percent interest for?

21

22 A. I can't recall specifically, but  
23 probably approximately \$7 million, give or  
24 take a few several hundred thousand.

25

26 Q. Is there a stock purchase  
27 agreement?

28

29 MR. SCOTT: Sorry, I didn't  
30 hear that. Could you repeat it?

31

32 BY MR. STEWART:

0145

1

2 Q. Was there a stock purchase  
3 agreement?

4

5 A. No, there was not.

6

7 Q. What kind of document memorandum  
8 organized that transaction?

9

10 A. I would have to review it first. I  
11 don't know. If I recall, it was simply a  
12 direct transaction of stock. There may  
13 have been some minor letter agreement but

Bertellotti

11 conducted through brokerage firm.  
12 Q. Do you know the investment bankers  
13 who were involved with the pre-packaged  
14 bankruptcy referred to in Paragraphs 5, 6,  
15 7 of your affidavit?

16 A. I do not. I know the law firm but  
17 not the investment banking firm.

18 Q. Who is the law firm?

19 A. Skadden Arps.

20 Q. Do you know how it was that the  
21 Peralta family came to know about First  
22 City?

23 MR. SCOTT: Object to the  
24 form of the question and the  
25 assumption is win it.

0146

1  
2 THE WITNESS: I mean, it  
3 goes back to -- I don't  
4 understand the intent. I don't  
5 know -- understand how it came to  
6 hold the position.

7 BY MR. STEWART:

8 Q. The Peralta family -- at some  
9 point, did the Peralta family become  
10 interested in holding a position in First  
11 City?

12 MR. LUCAS: Object to the  
13 form of the question.

14 BY MR. STEWART:

15 Q. Did they?

16 A. First of all, I don't know who  
17 originally held the bonds, but one  
18 might -- there must have been some reason  
19 for acquiring the bonds. What that reason  
20 was, I don't know. Maybe they simply  
21 thought it was a good investment and they  
22 would be repaid with principal and  
23 interest.

24 Q. When you say they?

25 A. Whoever held the bonds; whoever

0147

1 made the acquisition of the bonds. Don't  
2 know what their intent was. There's a lot  
3 of vulture funds come in, a lot of wealthy  
4 individuals -- lot of wealthy individuals  
5 to buy them, hope they are restructured  
6 revenue, more equity, more likely to  
7 receive cash. Cash is king. Even if you  
8 get 60 cents on the dollar, whatever  
9 it is, they may have looked at it as a  
10 financial transaction. I don't know  
11 specifically.

12 Q. We agree about the cash. Here is  
13 my question. I am trying to figure out --  
14 I mean, when Alper became a creditor of  
15 First City, okay, Alper was controlled by  
16 the Peralta family; is that correct?

17 MR. SCOTT: Object to the  
18 form of the question.

19 BY MR. STEWART:

20 Q. Or let me rephrase that. Was Alper  
21

Bertellotti

22 at that time, the time referred to in  
23 Paragraph 6 of your affidavit, controlled  
24 by the Peralta family?

25 A. Again, I wasn't involved in 1992.

0148

1 I don't know specifically. I believe it  
2 probably was.  
3 Q. Was it by the time you got directly  
4 involved in 1993?

5 A. You say, controlled by the Peralta  
6 family. Controlled. Not necessarily by  
7 the Peralta family. They are far removed  
8 from the day-to-day involvement of the  
9 business. They don't control anything in  
10 that sense. They ultimately may have been  
11 indirect shareholders, but you know, I  
12 don't want to be tripped up with the word,  
13 control. The company obviously is  
14 represented. The shareholders are  
15 represented by the board of directors.  
16 The company is represented by its senior  
17 officers who make the day-to-day  
18 decisions.

19 Q. That gets me back to the question I  
20 asked you before. Okay. So you are --  
21 you are president of Alper Holdings USA,  
22 Inc.

23 As president, do you know who your  
24 direct shareholders are of Alper Holdings  
25

0149

1 USA, Inc.?

2 A. Yes. It's two corporate  
3 shareholders; at one time, four. I don't  
4 remember the names right now. I will get  
5 them confused.

6 Q. Do you remember the names of the  
7 presidents of those companies?

8 A. I do not. No occasion to deal with  
9 them. I deal with the board of directors  
10 of Alper Holdings. Board of directors  
11 deals with the shareholders.

12 Q. Do you know the presidents of any  
13 of those companies or the name of the  
14 directors of any of those companies?

15 A. I do not.

16 Q. Okay. By contrast -- well, strike  
17 that.

18 Do you know who the officers of  
19 First City were immediately prior to the  
20 October 1992 bankruptcy?

21 A. First City Industries?

22 Q. Yes.

23 A. I do not.

24 Q. Do you know who the officers of  
25

0150

1 First City were immediately following the  
2 1992 bankruptcy?

3 A. Specifically, I do not, without  
4 referring to records.

5 Q. What records would you refer to?  
6



Bertellotti

A. To the extent minute books exist for that period of time, I suspect that would be the best place to look.

Q. Do you know who the officers of Alper were when it was incorporated in September 1992?

A. I do not.

Q. Do you know who the directors were when it was incorporated in 1992?

A. At the date of incorporation, I do not.

(Whereupon a Recess is

Taken.)

BY MR. STEWART:

Q. Couple of loose ends. Do you know why Nick Bauer decided to leave the company and cease being an employee?

A. Do I know precisely what his motivations were?

Q. Yeah.

A. I think he it was a mutual decision between the company and Nick Bauer. His services weren't required to the same extent they had been required in the past and that he could serve Saltire Industries in a consulting capacity.

Q. The decision with him to leave, anything to do with the litigation?

A. No.

Q. When was it made?

A. We had been talking about it for a couple of years. It was made early this summer.

Q. Do you know when exactly?

A. I believe in the -- approximately May or June. Again, as these environmental sites, some of them mature, some of them are in further stages of remediation. His day-to-day activity has been reduced somewhat in recent years.

Q. So he would have left by the end of June?

A. No, he left -- the decision was

made in the May - June time frame. He left, I believe, effective approximately September 1st.

Q. September 1st?

A. Approximately.

Q. It would have been before -- okay.

Another loose end before we break for lunch.

MR. SCOTT: I'm sorry, I

didn't hear what you just said.

BY MR. STEWART:

Q. I saw in the National Tennessean an article in which it was stated that you were contacted but did not talk to a reporter.

Do you recall being contacted by a

Bertellotti

18 reporter?

19 A. She called me, I believe, on a  
20 Friday. I was out of town, or I think I  
21 was out of town both Thursday and Friday  
22 and returned to my office Monday, and  
23 Tuesday I received the message.

24 Q. You never spoke to her?

25 A. I never spoke to her.

0153

1  
2 MR. STEWART: I would like  
3 to make this document an Exhibit  
4 to the deposition.

5 (Whereupon Exhibit 9 is  
6 Marked.)

7 MR. SCOTT: If you are  
8 going to ask any questions about  
9 it, we need to read it.

10 (Reading.)

11 MR. STEWART: Why don't you  
12 put them all in, and then you can  
13 take a break and read them?

14 (Whereupon Exhibit 10,  
15 Exhibit 11 and Exhibit 12 are  
16 Marked.)

17 (Whereupon a Recess is  
18 Taken.)

19 BY MR. STEWART:

20 Q. All right. We are back on the  
21 record. Mr. Bertellotti, coincidentally,  
22 I spoke to my secretary. We received a  
23 call that Johnny Cochran's firm had  
24 solicitors going from door-to-door in  
25 Dickson County, lining up for a class

0154

1  
2 action related to trichlorethylene  
3 contamination.

4 Could you tell me generally if you  
5 have any awareness of the activity  
6 occurring relating to the Dickson fill in  
7 Dickson, Tennessee right now?

8 A. I don't know anything specific.

9 Q. Did you look at these articles I  
10 handed you? The Exhibits?

11 A. I haven't read every four, but I  
12 perused all four.

13 Q. Have you seen any of these articles  
14 before I handed them to you?

15 A. I have seen a couple of articles.  
16 I don't know that I have seen any of these  
17 precisely. I don't think I have seen any  
18 of these precise articles.

19 MR. SCOTT: Let's go off  
20 the record. I want to consult  
21 before you answer any further  
22 questions.

23 (Whereupon a Recess is  
24 Taken.)

25 BY MR. STEWART:

0155

1  
2 Q. All right. We are back on the

Bertellotti  
 3 record. Mr. Bertellotti, can you tell me  
 4 what your understanding is, if any, of the  
 5 current investigating going on in Dickson  
 6 relating to the Dickson fill --

7 MR. LUCAS: What does this  
 8 have to do with the  
 9 jurisdictional issues with regard  
 10 to this deposition?

11 MR. SCOTT: Or with this  
 12 litigation? It's irrelevant.

13 MR. STEWART: It's a  
 14 discovery deposition. I am here  
 15 on a discovery deposition.

16 MR. SCOTT: It's our  
 17 position -- we know, obviously,  
 18 what you want to do. I am afraid  
 19 what you are trying to do is do  
 20 something here that you can  
 21 poison the jury further, the jury  
 22 pool with.

23 If you intend to give this  
 24 deposition to some other person  
 25 unrelated to this lawsuit, we are

0156  
 1 going -- we can do one or two  
 2 things.

3 Our position is, you should  
 4 not ask these questions and then  
 5 go and finish your other  
 6 questions. Save these for the  
 7 end, at which time we will  
 8 instruct the witness not to  
 9 answer those questions and seek a  
 10 protective order from the Court  
 11 unless we can enter into an  
 12 agreement. And we would be happy  
 13 to discuss with you off the  
 14 record some agreement as to  
 15 confidentiality or whatever.

16 MR. STEWART: I don't think  
 17 that will be necessary, because  
 18 let me ask you this. I think you  
 19 are concerned --

20 MR. SCOTT: Can we go off  
 21 the record?

22 MR. STEWART: Let's go off  
 23 the record.

24 (Whereupon a Recess is

0157  
 1 Taken.)

2 MR. STEWART: Let the  
 3 record reflect, I think  
 4 Mr. Scott's approach to this  
 5 particular issue which he  
 6 addressed while we were off the  
 7 record is something that I will  
 8 agree to, and we will put these  
 9 questions to the heels of time.  
 10 At the end of deposition, I will  
 11 decide whether I even need to  
 12 further inquire into this area.  
 13

Bertellotti

14 MR. SCOTT: Fair enough.  
 15 BY MR. STEWART:  
 16 Q. Let's turn to Realty Holdings, Inc.  
 17 Have you ever heard of that company?  
 18 A. Yes, I have.  
 19 Q. Was it dissolved?  
 20 A. Yes, it was dissolved.  
 21 Q. And can you look at your affidavit,  
 22 perhaps, and tell me when it was  
 23 dissolved?  
 24 A. It was dissolved earlier in 2003.  
 25 Q. Any idea as to the exact date?

0158

1 A. April or May.  
 2 Q. And why was it dissolved?  
 3 A. It has no operations and no assets.  
 4 Q. When was the last time it had  
 5 operations or assets?  
 6 A. To my knowledge, it has not had  
 7 operations. It was, in effect, a holding  
 8 company, as far as I can recall.  
 9 Q. So certainly, back through 1993, is  
 10 that what your recollection would be?  
 11 A. Approximately, yes.  
 12 Q. So you said it was a holding  
 13 company. Can you explain that?  
 14 A. It had subsidiaries. Specifically,  
 15 I don't recall which ones right now.  
 16 Q. You can't recall which subs it had?  
 17 A. Right.  
 18 Q. Other than holding those  
 19 subsidiaries, can you recall any other  
 20 operations it was involved in?  
 21 A. No.  
 22 Q. Do you recall whether it had any  
 23 line of business in and of itself?  
 24 A. Again, when?

0159

1 Q. From '93 forward.  
 2 A. Certainly in the last several  
 3 years, I remember a holding company.  
 4 Going back to my -- prior to 1997, when I  
 5 was not the senior officer of Alper  
 6 Holdings, I wouldn't have been familiar  
 7 with specifically what assets it held. I  
 8 never would have reviewed the financial  
 9 statements. All of these corporations  
 10 existed for a purpose at one point in  
 11 time. The businesses change over time.  
 12 Q. Where would I determine -- first of  
 13 all, can you tell me a single asset that  
 14 Realty Holdings held between 1993 and the  
 15 present?  
 16 A. I would need to review the  
 17 corporate structures precisely to know  
 18 what assets it held. But it certainly  
 19 held an interest in another entity.  
 20 Q. What entity is that?  
 21 A. I suspect -- I am pretty sure it  
 22 held direct ownership interest in a  
 23 company called Alper Securities. Again,  
 24

Bertellotti

25 this is all relevant to time because the  
0160

1  
2 corporate structure changes as a business  
3 changes. It's very difficult to answer  
4 this without talking about specific  
5 periods of time; and again, it wasn't  
6 noticed to talk about this level of detail  
7 of these subjects. It's very difficult to  
8 sit here and answer these questions off  
9 the top of my head without, again, having  
10 a more specific sense of time and access  
11 to records.

12 Q. Can you tell me if you can think of  
13 a single business activity that Realty  
14 Holdings conducted between 1993 and the  
15 present, other than holding stock in  
16 another business?

17 A. Specifically, at this time I can't  
18 answer that.

19 Q. Do you know whether you have ever  
20 been an officer of Realty Holdings?

21 A. I was senior officer at the time of  
22 the dissolution.

23 Q. Do you know when you became a  
24 senior officer?

25 A. Precisely, no.  
0161

1  
2 Q. Generally?

3 A. It's likely that I became a senior  
4 officer in 1997.

5 Q. Would we have to refer to documents  
6 to know for sure?

7 A. It would be better to refer to  
8 documents.

9 Q. Would minutes of directors meetings  
10 and shareholders meetings be those  
11 documents?

12 A. They would reflect that, yes.

13 Q. To know its line of businesses and  
14 assets, would we look at Realty Holdings'  
15 financial statements?

16 A. That would be a place to start.

17 Q. Have you looked at those anytime  
18 recently?

19 A. There had been no occasion to look  
20 at them for the last couple of years  
21 because as I said, it had no assets.

22 Q. You haven't looked at them  
23 recently?

24 A. I haven't looked at them recently.

25 Q. As of the time you were president  
0162

1  
2 of Alper Holdings, Inc. in 1997, is that  
3 the period when you are certain Realty  
4 Holdings had no assets?

5 A. I said it had no operations.

6 Q. No operations?

7 A. Yes.

8 Q. Okay. From 1997 to 2003?

9 A. With relatively high confidence. I

Bertellotti

10 don't want to make any absolute statements  
11 sitting here.

12 Q. Do you know when Realty Holdings,  
13 Inc. was incorporated?

14 A. Off the top of my head I do not,  
15 but I believe it's in your filing to the  
16 court. You submitted a variety of  
17 corporate documents that trailed its  
18 origin.

19 Q. Did you review those documents?

20 A. Yes.

21 Q. Did they accurately trace the  
22 origin?

23 A. They appear to. I didn't vet every  
24 last thing. They appear to.

25 Q. Are you referring to the documents  
0163

1 that  
2 that were filed by the plaintiffs just  
3 prior to the hearing on your motion to  
4 dismiss?

5 A. Correct. It would be filed around  
6 September 18.

7 Q. In reviewing those documents, did  
8 you see any description of corporate  
9 origination and successorship that was  
10 incorrect?

11 MR. SCOTT: Object to the  
12 form of the question, unless --

13 MR. STEWART: I agree.

14 BY MR. STEWART:

15 Q. Did you see -- did you notice any  
16 statements made in the document describing  
17 the evolution of First City Industries and  
18 its subsidiaries that were, in your mind,  
19 wrong?

20 MR. LUCAS: Point of  
21 clarification.

22 Are you asking him about  
23 statements in your brief, or are  
24 you asking him about the  
25 documents that were attached?

0164

1  
2 MR. MAY: Are you asking  
3 about the summary?

4 MR. STEWART: You know, I  
5 have been generous with speaking  
6 objections. I don't have  
7 problems with clarifications. I  
8 think the question is clear  
9 because he specifically referred  
10 to the documents, but so we are  
11 clear --

12 BY MR. STEWART:

13 Q. Mr. Bertellotti, what documents did  
14 you look at that you just referred to?

15 A. I looked at the plaintiffs' entire  
16 filing and I was referring to the  
17 corporate documents, meaning the various  
18 filings with secretaries of state, merger  
19 documents, successor incorporation  
20 documents, that type of thing.

Bertellotti

Q. Those that were filed by the plaintiffs?

A. Those were filed by the plaintiffs, those documents that were official state records.

Q. Did you find any discrepancies in those official state records?

MR. SCOTT: Object to the form of the question.

BY MR. STEWART:

Q. Go ahead and answer.

A. As I said earlier, I didn't review each of those documents and vet each of them for accuracy and test all of your assumptions. I will say, your transmittal or notice of filing the three-page pleading was filled with inaccuracies and misrepresentations as to what those documents said.

Q. Well, let me ask you this. What is the corporate predecessor of Realty Holdings, Inc.?

A. I would have to refer to the specific documents at this time.

Q. You couldn't tell me off the top of your head?

A. The corporate predecessor of Realty Holdings, Inc.? There may be several. It may be a successor to more than one

entity.

Q. Do you know whether Saltire Realty Holdings, Inc. changed its name to Realty Holdings, Inc. in 2001?

A. I believe it did.

Q. Do you know whether First City US Corp. Changed the name to Saltire Industries Holdings, Inc. in 1994?

A. I wouldn't have been involved in 1994.

Q. Do you know whether or not First City U.S. Corporation, Inc. is the corporate predecessor to Realty Holdings, Inc.?

A. Sitting here off the top of my head without the documents, I couldn't answer that.

Q. Do you know who the officers -- make this short. Has there ever been a time, to your knowledge, when the directors of Realty Holdings were not a subset of the directors of Alper Holdings USA, Inc.?

MR. SCOTT: Object to the

form of the question.

THE WITNESS: I don't know. It's possible they were at some point in time, possible there was

Bertellotti

6 overlap. It's possible. They  
7 were distinctly different at  
8 periods of time. I don't know.

9 BY MR. STEWART:  
10 Q. When would have been the first time  
11 you became aware of the directors of  
12 Realty Holdings, Inc.?

13 A. 1997.

14 Q. Okay. Who are those directors, do  
15 you know?

16 A. The -- precisely, 1997, sitting  
17 here right now, I do not recall. I deal  
18 with hundreds of issues; environmental  
19 issues, financial issues. I simply can't  
20 recall those specific details sitting  
21 here.

22 Q. We would have to look at the  
23 corporate documents?

24 A. You have to look at some type of  
25 record to indicate that.

0168

1  
2 Q. Is there anything here for any year  
3 that indicates who the directors of Realty  
4 Holdings were?

5 A. Yes, I could tell you, certainly.  
6 I am currently director of Realty  
7 Holdings.

8 Q. Any other directors?

9 A. I believe in the last couple of  
10 years, at least, I've been the sole  
11 director. Prior to that there have --  
12 there may have been another director.

13 Q. Okay. Who?

14 A. These -- there are state filings  
15 that show who the directors are.

16 Q. Who other than you are the  
17 officers?

18 A. Wayne Smith is an officer.

19 Q. What is he?

20 A. Probably the senior vice-president  
21 of finance or the vice-president -- chief  
22 financial officer, whatever the official  
23 positions are according to the bylaws.

24 Q. Any other officers?

25 A. Not that I know of.

0169

1  
2 Q. Do you know whether Realty Holdings  
3 ever had a director or vice-president of  
4 environmental affairs?

5 A. I believe it did not.

6 Q. Do you know if -- whether Realty  
7 Holdings, Inc. ever had any, ever owned  
8 any sites that had environmental  
9 contamination?

10 A. I don't know. It is history. I  
11 have no idea.

12 Q. Do you know whether Realty  
13 Holdings, Inc. or any of its predecessor  
14 ever had involvement with the Dickson  
15 contaminated site that's the subject of  
16 this lawsuit?



Bertellotti

17 A. I don't know, but I find it highly  
18 unlikely.

19 Q. Do you think of any time when  
20 Realty Holdings or any of its subsidiaries  
21 was in a business that would have created  
22 that kind of -- would have created ground  
23 water contamination?

24 A. I don't know of any but I find it  
25 highly unlikely. I doubt -- seriously

0170

1  
2 doubt it was ever a manufacturing company.

3 Q. Are you familiar with Alper  
4 Securities, Inc.?

5 A. Yes, I am.

6 Q. And is it currently ongoing?

7 A. Dissolved corporation.

8 Q. When did it dissolve?

9 A. I don't specifically recall. Some  
10 time in the last two years.

11 Q. Why did it dissolve?

12 A. It had no longer had any assets or  
13 operations.

14 Q. Okay. When was the last time, to  
15 your knowledge, that Alper Securities,  
16 Inc. had any ongoing operations?

17 A. Over two to three years ago.

18 Q. What were its operations when it  
19 had operations?

20 A. It held investments in a variety of  
21 securities partnerships. Predates current  
22 ownership's involvement.

23 Q. Were these securities partnerships  
24 all from the First City pre-1992 era?

25 MR. SCOTT: Object to the

0171

1  
2 form of the question.

3 BY MR. STEWART:

4 Q. Do these partnerships -- were these  
5 partnerships created or entered into prior  
6 to the bankruptcy that you referred to in  
7 your affidavit?

8 A. It's my belief that it's true.

9 Q. Do you know if First -- Alper  
10 Securities, Inc. ever took on additional  
11 business lines other than maintaining  
12 those securities?

13 A. Yes, in approximately 2000/2001, it  
14 created a subsidiary, capitalized  
15 subsidiary which subsidiary then made an  
16 investment in the -- I'm sorry, the  
17 magazine retail industry.

18 Q. What was the sub?

19 A. The name of the sub, I believe it  
20 was -- shoot -- Caper, C-a-p-e-r, and I am  
21 not certain I am right but I think it's  
22 something along those lines.

23 Q. In 2000, 2001, who was president of  
24 Realty Holdings -- I'm sorry, strike that.

25 In 2000, 2001, who was president of

0172

1

Bertellotti

Alper Securities, Inc.?

A. Most likely, I was.

Q. Do you know who its directors were at that time?

A. Myself, I am certain I was probably a director, and possibly Luis Felipe Sanchez.

Q. Can you remember any time when the directors of Alper Securities weren't a subset of the directors of Alper Holdings USA, Inc.?

MR. SCOTT: Object to the form.

THE WITNESS: Well, I am not a subset of the Alper Holdings. I have never been on the Alper Holdings board.

BY MR. STEWART:

Q. Can you remember a time when the directors of Alper Securities, Inc. were not also either directors or officers of Alper Holdings USA, Inc.?

A. Repeat the question.

Q. Can you remember any time when the

directors of Alper Securities, Inc. were not also either directors or officers of Alper Holdings USA, Inc.?

A. No.

Q. What happened with the Caper subsidiary?

A. Caper was a subsidiary of Alper Securities and made investments in the magazine retailing business, and that business failed.

Q. How large was the investment?

A. Five and a half million.

Q. Does Alper Securities, Inc. -- has that ever been a subsidiary of Scovill, Inc.?

A. Not to my knowledge.

Q. Has it ever been a subsidiary of Saltire, Inc., I should say?

A. Not to my knowledge.

Q. Has Realty Holdings, Inc. ever been a subsidiary of Saltire, Inc.?

A. Not to my knowledge.

Q. Are you familiar with the corporate predecessors of Alper Securities, Inc.?

A. Not precisely, without reviewing records.

Q. Do you know whether it is the corporate successor to First City Corporation?

A. I believe it is.

Q. When it dissolved, did it have any assets?

A. When did what dissolve?

Q. Alper Securities, Inc. dissolved?

A. At the time of dissolution, no, it

Bertellotti

13 didn't have any assets.

14 Q. Did it have any liabilities?

15 A. None.

16 Q. When Realty Holdings dissolved, did  
17 it have any assets?

18 A. It did not have any assets.

19 Q. Did it have any liabilities?

20 A. Yes, it had obligation to Saltire  
21 and it owed the parent maybe -- owed Alper  
22 Holdings \$22 million which was written  
23 off.

24 Q. Was there any time, to your  
25 knowledge, that Alper Securities was --

0175

1

2 owned any properties subject to  
3 environmental investigation?

4 A. Quite confident that it never did.  
5 As my understanding, it was set up solely  
6 for the purpose of making investments in  
7 securities.

8 Q. Are you confident that Alper -- are  
9 you confident that Alper Securities, Inc.  
10 and its predecessors were never involved  
11 with the Dickson County contamination  
12 that's the subject of this lawsuit?

13 A. I have no knowledge that they were  
14 ever and no reason to believe they ever  
15 would have been involved.

16 Q. You have no knowledge of them,  
17 Alper Securities, Inc. or its  
18 predecessors, being involved in  
19 manufacturing operations?

20 A. None.

21 Q. Is Alper Securities involved in any  
22 lawsuit that you're involved in?

23 A. I have no knowledge.

24 Q. Was Realty Holdings involved in any  
25 lawsuits?

0176

1

2 A. Not to my knowledge.

3 Q. Do you know if -- strike that.  
4 (Whereupon a Recess is  
5 Taken.)

6 BY MR. STEWART:

7 Q. Mr. Bertellotti, I would like you  
8 to refer back to Exhibit 7. Do you  
9 know --

10 A. I haven't found 7 yet.

11 Q. It's the management agreement.

12 A. I have it.

13 Q. Do you know whether there was a  
14 management agreement that predated this  
15 agreement?

16 A. I believe there was.

17 Q. Do you know when that agreement was  
18 signed, the prior agreement?

19 A. I do not.

20 Q. Do you know if there is such an  
21 agreement in your records at the  
22 headquarters of Alper?

23 A. The agreement that predates this

Bertellotti

24 agreement?

25 Q. Yes. Is there a copy of the  
0177

1  
2 management agreement that predates the  
3 agreement that is Exhibit 7 at your  
4 headquarters?

5 A. I do not know.

6 Q. Who would know that?

7 A. I don't know that anybody would  
8 know that off the top of their heads. You  
9 have to search the files.

10 Q. Can you tell me whether this  
11 management agreement accurately reflects  
12 your actual procedures for charging Alper  
13 Holdings USA subsidiaries for  
14 administrative expenses provided by Alper  
15 Holdings USA?

16 A. When you say -- again, it would  
17 be -- by administrative service, are you  
18 talking about the management services, the  
19 services that are detailed in this  
20 agreement?

21 Q. Let me make it more clear. If I  
22 look at this agreement that is Exhibit 7,  
23 does it tell me the procedures whereby  
24 from January 1, 1995 forward, Alper  
25 Holdings USA, Inc. calculated and billed  
0178

1  
2 its management administrative charges to  
3 its subsidiaries?

4 MR. SCOTT: Object to the  
5 form.

6 THE WITNESS: I apologize.  
7 Repeat the question one more  
8 time.

9 BY MR. STEWART:  
10 Q. Well, was there any aspect of this  
11 agreement that was not adhered to by the  
12 parties to the agreement that you know of,  
13 while it was in force?

14 A. Not that I know of.

15 Q. I mean, if I want to know how Alper  
16 Holdings USA calculated the administrative  
17 and management charges it charged to its  
18 subsidiaries from 1990 -- from January 1,  
19 1995 to the present, could I look to this  
20 agreement to determine that?

21 A. I think this accurately represents  
22 the procedure we go through.

23 Q. Did Alper, that you know of, ever  
24 have administrative expenses that were not  
25 billed to some subsidiary?  
0179

1  
2 A. Did Alper have administrative  
3 expense that were not billed to some  
4 subsidiary? Yes, it is possible in  
5 certain years there's a portion of Alper's  
6 expenses that are not billed specifically  
7 to a subsidiary but, in turn, absorbed by  
8 Alper.

Bertellotti

9 Q. When would you have become familiar  
10 with the specific amounts charged by Alper  
11 to its subsidiaries for the types of  
12 expenses governed by the agreement that  
13 was Exhibit 7?

14 A. When would I be informed -- with  
15 respect to any given year, I assume you  
16 are asking.

17 Q. Yes. When would you have learned  
18 about this process and known about those  
19 charges?

20 A. Well, I have known about the  
21 process in general for many years,  
22 although the procedure in the  
23 implementation of the agreement is left to  
24 the chief financial officer of Alper.

25 Q. Do you see on Paragraph 3-B which

0180

1 is  
2 is on the third page, do you see it talks  
3 about a budget of operative holdings and  
4 anticipated holdings and operation  
5 expenses for the next calendar year being  
6 prepared before December 15?

7 A. Yes.

8 Q. Do you know if those budgets were  
9 created on an annual basis during the time  
10 that you were president of Alper Holdings  
11 USA?

12 A. Yes, I believe I am quite confident  
13 Mr. Smith goes through this process each  
14 year. Whether he completes it precisely  
15 by December 15 or not, I can't say.

16 Q. You don't know of any year in which  
17 the process was abandoned altogether?

18 A. I do not know of any year we  
19 abandoned it.

20 Q. And are these -- the records of  
21 these budgets, are they maintained at  
22 Alper's headquarters here in New York?

23 A. To the extent they still exist,  
24 yes, I don't know what the financial  
25 people do in terms of keeping specific

0181

1 records such as this, but there certainly  
2 should be some records.

3 Q. Would Mr. Smith be the one to ask?

4 A. He would be a better person to ask.

5 Q. Tell me what kind of legal expenses  
6 would be included in the amounts described  
7 as compensation in the management  
8 agreement that is Exhibit 8.

9 A. Would primarily be legal expenses.  
10 Many of the legal expenses, for example,  
11 legal expenses such as relating directly  
12 to the environmental affairs of Saltire,  
13 are billed directly to Saltire by  
14 Saltire's counsel.

15 The primary legal expenses at Alper  
16 would allocate those of general counsel or  
17 any outsider serving in that capacity to  
18 the extent they were reviewing documents;

Bertellotti

providing advice, subject to the management agreement, on contingent liabilities; pending litigation; things that we hadn't hired direct attorneys for. If it was the business affairs of Saltire that involved somebody needing -- the

0182

1

affairs were such that some legal advice was needed, the Alper general counsel would provide those services subject to the management agreement.

6

Q. But would outside attorneys bill their charges directly to Saltire for work performed?

9

A. Ones, if they were retained by Saltire, billed directly to Saltire.

11

Q. So would the charges of outside attorneys be anywhere included in the compensation set out?

14

A. They should not be.

15

Q. Would charges for outside accountants' services be included in the compensation outline in Part 3?

18

A. This is better question to ask Mr. Smith. Can I -- for example, the outside, this is my understanding of how it works. For example, outside accountants such as the auditors Deloitte & Touche, they send us a single bill, and I am going to defer to Mr. Smith on that question as to precisely how that works

0183

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with the auditors. I simply can't recall at this moment after what we have been through today.

5

Q. Tell me, for outside environmental consultants, are their charges related to Saltire activities billed directly to Saltire?

9

A. My experience has been always billed directly to Saltire.

11

Q. So in your experience, would any of them be included in this compensation that is Part 3?

14

A. They would not.

15

Q. Currently, do you know what environmental consultants are being used on the Dickson site which is the subject of this lawsuit?

19

A. I believe primarily ICF Kaiser, but they are known by another name, successor name.

22

Q. Is there currently a contract in existence with ICF Kaiser, its successor, and Alper Holdings USA, Inc.?

25

A. It's my understanding, with Alper

0184

1

Holdings.

3

No, my understanding the contract is with Saltire Industrial, Inc.

4

Bertellotti

Q. So to your knowledge, you don't believe there's a contract; or I take it, your testimony is you don't believe there's a contract between Alper Holdings USA, Inc. and ICF Kaiser?

A. No. As you asked the question, it does not exist to my knowledge.

Q. Do you know if there has ever been such a document?

A. Not to my knowledge, no. Specifically with regard to Alper Holdings USA, Inc., that is what we are talking about.

Q. Do you know currently what ICF Kaiser is charging for the services related to the Dickson contaminated site subject to this lawsuit on an annual basis?

A. Are you asking -- you mean roughly what their total expenses are on an annual basis?

0185

Q. Yes.

A. I don't know precisely but in reviewing, we spend as much as between -- somewhere between three and five hundred thousand per year total expenses, is a rough estimate related to the Dickson site. How much of that precisely is with ICF Kaiser, I couldn't say. I would suggest a large portion of it is.

Q. Okay. For 2003, do you know what the fee charged for Scovill pursuant to the compensation Section 3 of the management agreement?

A. 2003?

Q. Yes.

A. It's approximately \$2 million.

Q. And for 2002, do you know the approximate?

A. Again, \$2 million, \$2 million I believe.

Q. And for 2001?

A. 2001, I also believe it's approximately \$2 million.

Q. And for 1997?

0186

A. I do not know without looking at the records.

Q. Okay. For 1998?

A. It's somewhere between two and three and a half million dollars. I would assume it is approximately the same for 1997, as well.

Q. Do you have any reason -- strike that.

Now, let's talk about Section 2 of your management agreement.

Do you see the description of direct expenses?

A. Yes.

Bertellotti

16 Q. Okay. Can you describe for me some  
17 examples of direct expenses that would be  
18 covered by Part 2?

19 A. What this says, direct expenses  
20 such as out of direct -- out-of-pocket  
21 expenses reasonably incurred by Alper  
22 Holdings.

23 You know what, Mr. Stewart, I would  
24 need to read this agreement carefully.

25 Do you want me to take ten minutes  
0187  
1 to read it carefully?

2 Q. No. Do you, just looking at it  
3 right now, are you comfortable giving me  
4 some examples of direct expenses, just the  
5 knowledge that you brought to this  
6 deposition in your head?

7 A. Again, I do not implement this  
8 agreement on an annual basis. CFO does  
9 this. My interpretation, my belief that  
10 we practice, direct expenses as defined  
11 here in this agreement are talking about  
12 things like out-of-pocket expenses  
13 reasonably incurred by Alper Holdings.  
14 The compensation is different to the  
15 extent those were shared expenses, shared  
16 services. I don't know, there would be an  
17 awful lot of direct expenses under this  
18 agreement.

19 An example as I referred to  
20 earlier, an example, maybe the accounting  
21 fees, the audit fees, those I do not  
22 believe Deloitte & Touche bills each  
23 company independently. I believe there's  
24 a single bill. The lease for the office  
25

0188  
1 space may be under the covered expenses,  
2 but I would direct those inquiries to the  
3 CFO who implements this agreement.

4 Q. Who are the primary outside counsel  
5 for Alper Holdings USA, Inc.?

6 A. Primary outside counsel for Alper  
7 Holdings? Alper Holdings does not have a  
8 primary counsel at this point in time.

9 Q. What office are we sitting in right  
10 now?

11 A. We are sitting in the offices of  
12 Angel & Frankel.

13 Q. What does Angel & Frankel have to  
14 do with Alper Holdings USA?

15 A. As we were told in the beginning of  
16 the deposition, here as counsel for  
17 Sal tire.

18 Q. And what kind of services do they  
19 perform for Sal tire?

20 A. They provide --

21 MR. LUCAS: Wait. Hold on.  
22 You can answer that generally,  
23 very generally, but I would  
24 caution you not to give any  
25

0189



Bertellotti

1  
2 specific answers. That would  
3 disclose.

4 MR. STEWART: Let me  
5 rephrase the question; I think  
6 you will see where we are going.

7 BY MR. STEWART:

8 Q. Are they counsel for Saltire's  
9 bankruptcy issues?

10 A. Not necessarily.

11 Q. Are they counsel in the bankruptcy  
12 issues specifically?

13 A. Their counsel is regarding  
14 corporate issues in general. It may  
15 include bankruptcy. Includes a variety of  
16 other things.

17 Q. Is Saltire as we sit here today  
18 planning to declare bankruptcy any time in  
19 the near future?

20 MR. LUCAS: Hold on. I  
21 don't know that he can answer  
22 questions about the scope of any  
23 law firm's representation without  
24 invading attorney-client  
25 privilege, and you shouldn't do

0190

1  
2 that.

3 MR. STEWART: My question is  
4 no longer directed at what the  
5 attorneys are doing. I want to  
6 know if he, as an officer of the  
7 company, has discussed  
8 declaring bankruptcy in the near  
9 future.

10 MR. LUCAS: Hold on. I am  
11 going to object to that again on  
12 the same grounds that when you  
13 start asking him questions,  
14 that you start off by saying,  
15 well, have you discussed this  
16 with your attorneys? And then  
17 you change to it a general  
18 question.

19 It invades the  
20 attorney-client privilege, I  
21 think. I didn't mean to  
22 interrupt if you wanted to add  
23 something.

24 MR. MAY: I wanted to at  
25 this point, even though I am

0191

1  
2 representing the witness in  
3 connection directly with the  
4 deposition, say that I think we  
5 are intruding on privileged  
6 areas. And I would direct him  
7 not to answer.

8 MR. SCOTT: I object to  
9 that on the grounds it's totally  
10 irrelevant. You can't lead to  
11 any physical evidence. What

12 Bertellotti  
 13 their plans are or may be or may  
 14 not with respect to any legal  
 15 remedy that the company might  
 16 have.  
 17 MR. STEWART: The reference  
 18 to bankruptcy in the deposition  
 19 that we have right now is, to say  
 20 the least, obvious on its face.  
 21 MR. SCOTT: If you were a  
 22 judgment creditor, it may be  
 23 different.  
 24 MR. STEWART: It's an  
 25 element of the issue we are  
 talking about. I just want to

0192  
 1  
 2 know.  
 3 MR. SCOTT: I don't think  
 4 so.  
 5 BY MR. STEWART:  
 6 Q. If Saltire -- let me phrase it  
 7 differently. I don't want to know about  
 8 your discussions with any counsel. What I  
 9 want to know -- internally, with Mr.  
 10 Smith, have you ever had a discussion  
 11 without counsel present about when Saltire  
 12 will declare bankruptcy, if ever?

13 MR. LUCAS: Wait, because  
 14 hypothetically if there were such  
 15 discussions, it could reveal  
 16 attorney-client privileges.  
 17 Give us a minute on this to  
 18 consult with the witness and see  
 19 where we are on the privilege  
 20 issues and then we will --  
 21 MR. STEWART: Tell you  
 22 what. Let's put it to the heels,  
 23 all right? We will come back.

24 MR. LUCAS: Okay.  
 25 MR. STEWART: You all can

0193  
 1  
 2 discuss it at the next break. I  
 3 think there will be one more  
 4 break before we finish with this  
 5 witness.

6 BY MR. STEWART:  
 7 Q. What were the combined salaries of  
 8 Alper Holdings USA employees in 2003?  
 9 A. Combined salaries?  
 10 Q. Generally.  
 11 A. Generally would be somewhere of the  
 12 magnitude of \$1 million to \$1.2 million on  
 13 an aggregate basis.  
 14 Q. Tell me what document I can look  
 15 at, if any, to show me the combined  
 16 salaries for Alper Holdings employees for  
 17 all for the years 1992 through 2003.  
 18 A. Clearly, in the corporate records.  
 19 In the financial statements.  
 20 Q. I mean, would those salaries be  
 21 totaled in the budgets that Alper would  
 22 produce pursuant to Section 3 of the

Bertellotti

23 management agreement?

24 A. They may be in there individually;  
25 they may be there in aggregate. They

0194

1

2 should be reviewed in preparation for the  
3 management fee.

4 Q. And do you know what Alper's total  
5 administrative expenses were for 2003?

6 A. 2003, I would guess roughly \$2  
7 million, plus or minus a couple hundred  
8 thousand. Maybe two, three, four at the  
9 most. I would estimate the maximum Alper  
10 expenses for 2003 were at the most, \$2.3  
11 to \$2.4 million in aggregate.

12 Q. What were the total expenses for  
13 2002?

14 A. They would be somewhere in the same  
15 order of magnitude. Somewhere north of \$2  
16 million, certainly less than three.

17 Q. How about 2001?

18 A. I am trying to think who was on the  
19 payroll in 2001; they would have been  
20 similar.

21 Q. How about '97?

22 A. '97, they may have been as high as  
23 eight to nine, \$10 million I am not sure.

24 Q. How about '98?

25 A. They would have been -- again,

0195

1

2 sitting here, more than six, less than  
3 ten. Repeat -- just repeat back the years  
4 for me. Let me think this through  
5 clearly.

6 Q. I gave you '98, '97, 2001, 2003.

7 A. Can we take them chronologically?  
8 '98 was the first year. You said '97.

9 Q. Sure.

10 A. '97, they would have been again  
11 north of six million; as high as ten  
12 million in '97.

13 Q. '98?

14 A. '98, they certainly would have been  
15 in excess of five million; between five  
16 and eight million.

17 Q. '99?

18 A. '99, five to six million.

19 Q. 2001-2-3, stand by two million?

20 A. 2000 -- I don't think I said two  
21 million for 2000. 2000, I believe, would  
22 have been higher. 2000 would have been  
23 probably in the magnitude of three, four  
24 million, four and a half, maybe five  
25 million. 2000 was -- is a little more

0196

1

2 complicated to guess at, because it was a  
3 year with a lot of change. Certain people  
4 dropped off the payroll in 2000. It's  
5 hard for me to estimate.

6 Q. I would like to hand you another  
7 document.

Bertellotti

8 (Whereupon Exhibit 13 is  
9 Marked.)

10 BY MR. STEWART:

11 Q. Could you turn to Page 33, and look  
12 at Footnote 25? Actually, Footnote 24.

13 A. Yes.

14 Q. Okay. Can you read that Footnote  
15 for me, not in the record, just read it?

16 A. While irrelevant to this Court's  
17 analysis, the Plaintiffs states the \$4.5  
18 million paid in 2000 represents 10 percent  
19 of Saltire's assets. However, this  
20 statement does not account for the fact  
21 that \$4.5 million was paid on a  
22 consolidated basis and included  
23 substantial fees and services related to  
24 the Alper Ink sale. Thus, to correctly  
25 determine the percentage, the Plaintiffs

0197  
1 should have looked at the consolidated  
2 assets which would have revealed the  
3 percentage of 2.6 percent.

4 Q. Okay. Do you know what  
5 consolidated assets that it's referring  
6 to?

7 A. Yes, I do.

8 Q. Tell me what they are.

9 A. Saltire, at the end of 1999 and the  
10 beginning of 2000, had consolidated assets  
11 of approximately \$172 million. It also  
12 had consolidated revenues of approximately  
13 170 to \$175 million dollars.

14 Q. Consolidated; tell me what you mean  
15 by consolidated?

16 A. Consolidated is a concept of  
17 financial accounting. It's required by  
18 GAAP, to consolidate subsidiaries that  
19 have significant control over. It was the  
20 sole shareholder or owner of Alper Ink  
21 Group as well as Alper Development, Inc.  
22 Most of these assets and sales relate to  
23 the Alper Ink Group and are required by  
24 generally accepted accounting principals

0198  
1 to be consolidated into Saltire's results.  
2 What you saw, though, I believe in the  
3 financial statements GAAP also states that  
4 to the extent you determined to divest  
5 yourself of the business, you are required  
6 to account for on a discontinued  
7 operations business. Meaning they no  
8 longer consolidate but show, in effect,  
9 the equity method with the reserve to  
10 close. So GAAP makes it a little bit  
11 difficult to understand, with respect to  
12 those specific years.

13 Q. When you say consolidated, is what  
14 you are saying that consolidated financial  
15 statements would reflect the assets of  
16 Scovill and some subsidiaries  
17 consolidated?  
18

Bertellotti

19 A. Yes.  
 20 Q. For tax purposes?  
 21 A. Pardon?  
 22 Q. As for tax purposes?  
 23 A. I was using the concept of  
 24 accounting purposes.  
 25 Q. I take it, if you look at the

0199

1  
 2 actual financial statements that you have  
 3 been provided today as an exhibit, that  
 4 the \$4.5 million paid in 2000 did  
 5 represent 10 percent of the assets listed  
 6 for Saltire on those financial statements?  
 7 A. On unconsolidated basis, yes.  
 8 Q. Now, tell me something. Do you see  
 9 the statement that says that the \$4.5  
 10 million was paid on a consolidated basis  
 11 and included substantial fees and services  
 12 related to the Alper Ink sale?  
 13 A. That's correct.  
 14 Q. Whose fees and service are we  
 15 talking about there?  
 16 A. Well, primarily it relates -- there  
 17 were several individuals who were direct  
 18 employees of Alper Holdings whose sole  
 19 purpose at that particular point in time  
 20 was to perform services on behalf of Alper  
 21 Ink Group, and so their salaries and  
 22 associated expenses were allocated to  
 23 Alper Ink Group. The problem was, Alper  
 24 Ink Group was subject to a variety -- it  
 25 was a leveraged transaction or leveraged

0200

1  
 2 company subject to certain bank covenants  
 3 where they put restrictions on the ability  
 4 to Alper Ink Group to pay management fees.  
 5 Regardless of their legitimacy, they put  
 6 restrictions like banks do on intercompany  
 7 transfers; and so for that reason,  
 8 Saltire, who had the equity interest in  
 9 Alper Ink Group, paid the expenses of the  
 10 Alper Ink Group to the extent direct Alper  
 11 employees were provided services to Alper  
 12 Ink Group, and they were substantial in  
 13 the years 1999, 2000.

14 Q. They were substantial in 2000  
 15 because of the Alper Ink sale?

16 A. Let me read this. They were  
 17 substantial in the sense these people were  
 18 providing substantial services to Alper  
 19 Ink Group in respect to its ongoing  
 20 operations as well as the sale, but they  
 21 were very, very involved with the Alper  
 22 Ink Group in the ordinary course as well  
 23 with respect to the sale.

24 Q. Just the operating sale, it was  
 25 included in 2000?

0201

1  
 2 A. May of 2000.  
 3 Q. When were the initial negotiations

Bertellotti

related to the Alper sale begun?

A. Decision to sell the Alper Group was made in the second quarter, I believe, of 1999. It was initially made in approximately April/May of 1999.

Obviously it went on for approximately a year.

Q. The payments under the management agreement booked by Alper's income on its financial statements?

A. I mean, you need to be more specific as an accountant. They are booked in net income revenues. It's an inflow of cash, inflow of money, accrual under some section under the revenues before you get to the expenses, yes.

Q. And what was Alper's total income from all activities? 2003, Alper Holdings USA total income?

MR. SCOTT: Object to the form of the question.

MR. STEWART: State your

objection.

MR. SCOTT: Is it gross, net --

THE WITNESS: Talking about revenues.

BY MR. STEWART:

Q. Why don't you tell me the revenues?

A. I would have to estimate more than \$4 million, probably less than \$5 million.

Q. How about for 2002?

A. 2002, roughly \$4 million.

Q. How about 2001?

A. 2001, without reviewing the financial statements and again, I am hesitant to -- without a specific definition of revenue and looking at the accounting statements.

Q. Why don't you give me your definition of revenue?

A. Well, when -- it's very simple in a business that has ongoing operations. In a business like Alper or Saltire where you don't have any manufacturing operations, are not providing services on a routine

basis such as IBM corporation or General Electric corporation, nothing -- for the most part, nothing is recurring in the ordinary.

Q. Let me ask you this. Do you have a statement of revenues in your financial statements?

A. Certainly there's a revenue line.

Q. Okay. Now what would the revenue line be for 2003?

A. I don't know precisely, because without having this in front of me, I can't recall if we book interest income

Bertellotti

15 and advisory income as revenue, other  
16 income, interest income. There's three or  
17 four different ways to classify these  
18 different types of income.

19 Q. Tell me the documents you would  
20 refer to to get to those numbers.

21 A. I would refer to the audited  
22 financial statements.

23 Q. Of Alper Holdings USA?

24 A. Alper Holdings USA, Inc.

25 Q. Are the payments under the

0204

1 management agreement, Section 3, made by  
2 Saltire Industrial part of the revenue you  
3 just described of Alper Holdings USA?

4 A. Certainly in some classification  
5 relating to income. Specifically whether  
6 it's identified as management fees, other  
7 income or revenues, I am not certain,  
8 sitting here.

9 Q. What did Carlos Peralta do to do to  
10 earn \$480,000 in business expenses in  
11 2000?

12 A. Mr. Peralta's consultant agreement  
13 with Alper Holdings.

14 Q. Is that a written agreement?

15 A. Written agreement.

16 Q. How much is he paid?

17 A. I think you know that, it's in  
18 your --

19 Q. I know he was paid \$480,000 in the  
20 year 2000.

21 Has he been paid money under that  
22 agreement in other years?

23 A. I believe so.

24 Q. Could you describe those payments?

0205

1 A. Payments would be consistent with  
2 what the agreement said, which is  
3 approximately \$480,000 a year.

4 Q. How long has that agreement been in  
5 force?

6 A. I don't know precisely. The board  
7 evaluated that agreement in their  
8 judgment. They believe that was a good  
9 use of funds. It was a good idea for  
10 corporations to enter into a consultant  
11 agreement.

12 Mr. Peralta is one of the prominent  
13 businessmen in Mexico. He has routinely  
14 brought investment opportunities to the  
15 United States and Mexico and around the  
16 world by a variety of advisors and  
17 investment banks.

18 Alper Holdings was an investment  
19 company designed to make investments in  
20 other companies. It was believed that  
21 Mr. Peralta could help evaluate, bring  
22 these opportunities to the company and  
23 evaluate them once they were there. The  
24 board's judgment that was a good use -- it

Bertellotti

0206

1

2 was a prudent thing to enter into that  
3 agreement.

4

5 Q. Has this agreement that you are  
6 referring to, new business consultant  
7 agreement, has that been in force since  
8 you have been president of Alper Holdings  
9 USA, Inc.?

10

11 A. I believe it's approximately the  
12 same amount of time.

13

14 Q. Okay. Do you know if Carlos  
15 Peralta has received payments from Alper  
16 or any of the subsidiaries during that  
17 period, other than those payments you just  
18 described?

19

20 A. Has Mr. Peralta -- say that?

21

22 Q. Has Mr. Carlos Peralta received  
23 payments from Alper Holdings USA, Inc. or  
24 its subsidiaries in addition to the  
25 \$480,000 a year he has received under his  
26 consultant agreement?

27

28 A. None whatsoever.

29

30 Q. How many new businesses did -- has  
31 Alper purchased since 2000?

32

33 A. Purchased since 2000?

0207

1

2 Q. Since December 2000.

3

4 A. Well, we made an investment. It  
5 was a minor investment for our position in  
6 the magazine we tailored to earlier.

7

8 Q. Was it Mr. Peralta's idea?

9

10 A. It was.

11

12 Q. How often do you meet with  
13 Mr. Peralta personally, face-to-face?

14

15 A. Very infrequently.

16

17 Q. Like, how many times a year?

18

19 A. Depends on the year.

20

21 Q. Well?

22

23 A. Anywhere from zero to seven, if you  
24 go back over a several year period.

25

26 Q. How many times have you discussed  
27 this particular lawsuit with Mr. Peralta?

28

29 A. Never.

30

31 Q. How many times have you discussed  
32 or how often -- you said zero to seven.

33

34 Can you give me an idea, from 2000 to  
35 2003, how many times would you meet with  
36 Mr. Peralta?

37

38 A. Without referring to a calendar I  
39 couldn't give you a precise estimate. If

0208

1

2 you say 2000, that is approximately a  
3 four-year period this time. In aggregate,  
4 less than six times, less than seven  
5 times.

6

7 Q. What calendar would you refer to?  
8 Do you keep a personal calendar?

9

10 A. I do. It's only for the current  
11 year.

12

13 Q. How many times a year do you talk



Bertellotti

11 to Mr. Peralta on the phone?

12 A. Infrequently.

13 Q. Ten times a year?

14 A. Less than that.

15 Q. Five times a year?

16 A. Somewhere between zero and five

17 times a year.

18 Q. How many years have you spoken to

19 him not at all?

20 A. Pardon me?

21 Q. Since you have been president, how

22 many years have there been which you have

23 not spoken to Mr. Peralta?

24 A. How many years of which I have not

25 spoken -- I am trying to think. Again,

0209

1

2 you are asking very specific questions

3 regarding extended period of time, and I

4 can't recall specifically when I have

5 spoken to Mr. Peralta. Again, I report to

6 the board of directors.

7 Q. Okay. Would you have spoken to

8 Mr. Peralta about the Alper Ink sale?

9 A. Yes. There was at least one

10 meeting, possibly two meetings, with our

11 financial advisors relating to the Alper

12 Ink Group sale where he was present,

13 along -- the purpose of the meeting was to

14 present issues to the board of directors

15 of Alper Holdings. Mr. Peralta was

16 present at least one, possibly two, of

17 those occasions.

18 Q. Would you have spoken to

19 Mr. Peralta relating to the sale of

20 Scovill Fasteners?

21 A. I would not have -- I was very

22 involved in the sale of Scovill Fasteners

23 but that was 1995. I was neither an

24 officer or director of any of these

25 companies. I was, again, a kind of

0210

1

2 financial expert, corporate finance

3 expert. I effected the sale of Scovill

4 Fasteners, along with a colleague.

5 Q. Would you have spoken to

6 Mr. Peralta about the dissolution of

7 Realty Holdings?

8 A. No.

9 Q. Would you have spoken to him about

10 the dissolution of Alper Securities?

11 A. No.

12 Q. Would you have spoken to him about

13 environmental liabilities of Scovill --

14 Sal tire?

15 A. No. There would be no reason to do

16 so. Speak to the board of directors about

17 that. Of Sal tire.

18 Q. Are you saying you don't speak to

19 the board of directors of Alper Holdings

20 USA, Inc. about Sal tire's activities?

21 A. It depends. On a day-to-day

Bertellotti

22 basis -- as officer of Saltire, I have the  
23 authority divested in me under the bylaws  
24 and charter to effect its day-to-day  
25 business. With respect to certain

0211

1  
2 transactions, I bring it to the attention  
3 of the board of directors and seek their  
4 advice for counsel. Certain transactions,  
5 we seek their approval.

6 In the context of discussing Alper  
7 Holdings business and its investments in  
8 various subsidiaries, I often talk about  
9 specific subsidiaries, including Saltire,  
10 which is a subsidiary, obviously, with  
11 substantial liabilities. I would discuss  
12 with the Alper Holdings board its  
13 investment in Saltire Industrial and the  
14 issues facing Saltire Industrial.

15 Q. I think you have already said --  
16 just correct me if I am wrong, when  
17 you are talking to the board, that is, a  
18 meeting of the board where minutes are  
19 taken, whether it be the board of Saltire  
20 or the board of Alper?

21 A. No. If I said that, I misspoke,  
22 and I don't think I said that. There  
23 are -- the board of Saltire Industrial is  
24 a single individual Luis Felipe Sanchez.  
25 I routinely speak to him by telephone as

0212

1  
2 simply as a board member, not in the  
3 context of a formal meeting. Not in the  
4 context of a specific decision but just  
5 seeking his counsel, keeping him  
6 up-to-date with respect to Saltire's  
7 business issues.

8 Q. Including this lawsuit?

9 A. I have spoken to him about --  
10 informed him of the lawsuit.

11 Q. What does Mr. Sanchez live?

12 A. Mexico City.

13 Q. Does he have a personal friend of  
14 Carlos Peralta?

15 A. No.

16 Q. Is he involved in the Grupo IUSA  
17 organization?

18 A. I believe he is.

19 Q. What is his office, if he has one  
20 in that organization?

21 A. He is a senior financial executive.  
22 Precise title, I don't know.

23 Q. So when you talk to the board of  
24 Saltire, minutes may not be taken,  
25 depending?

0213

1  
2 A. It depends.

3 Q. Okay. When you have spoken to the  
4 board of Alper Holdings USA, Inc., is that  
5 always done in the context of a board  
6 meeting in which minutes are taken?

Bertellotti

7 A. In recent years, more often than  
8 not, that is not the case. More often  
9 it's my contacting with the liaison. Luis  
10 Felipe Sanchez acts as primary liaison for  
11 the Alper Holdings board. I speak to him  
12 quite routinely with regard to Alper  
13 Holdings business affairs.

14 Q. As you speak to him as director,  
15 minutes are not taken?

16 A. Generally not. Normally when  
17 there's a decision to be taken by the  
18 board, it's reflected unanimous written  
19 consent.

20 Q. How long has that been going on,  
21 the speaking to the board member of Alper  
22 without the other board members present,  
23 without minutes being taken?

24 MR. SCOTT: Object to the  
25 form of the question.

0214

1  
2 BY MR. STEWART:

3 Q. How long have you been speaking  
4 just directly with Mr. Sanchez about Alper  
5 Holdings USA business?

6 A. On and off since he has been there.  
7 I also speak to other board members. What  
8 I said, my primary contact in the board  
9 and primary liaison with the board, rather  
10 than trying to contact all four people in  
11 Mexico simultaneously, I communicate more  
12 often than not through Mr. Sanchez.

13 Q. Scovill Fasteners, do you see in  
14 your affidavit that you say in Paragraph  
15 4, by 1987 Saltire was primarily engaged  
16 in the manufacturing of garment and  
17 industrial fasteners through its  
18 subsidiary named Scovill Fasteners, Inc.

19 A. Yes.

20 Q. Can you tell me, at that point was  
21 that the only profitable business Saltire  
22 was engaged in, that you know of?

23 A. Generally speaking, that is my  
24 understanding of 1997. The reason I  
25 believe that, between becoming familiar

0215

1  
2 with the other divestiture agreements that  
3 are referenced in Section 3, that the  
4 majority -- my understanding reading those  
5 agreements, as well as the history of  
6 Scovill Fasteners, is that was Saltire's  
7 sole operating business. It was conducted  
8 through subsidiary.

9 Q. Now, Scovill Fasteners sale, what  
10 was your personal involvement with that?

11 A. Again, as kind of a corporate  
12 finance expert, I guess, an investment  
13 banking person. The vast majority of my  
14 career has been spent as a corporate  
15 finance executive, an investment banking  
16 executive, and I have experience in  
17 mergers and acquisition, capital markets

Bertellotti

18 transactions, arranging bank loans, that  
19 type of thing.

20 So my involvement in the Scovill  
21 Fasteners sale was effecting the sale of  
22 Scovill Fasteners in such a way that we  
23 would maximize the value of Scovill  
24 Fasteners through the process and then  
25 complete the sale itself.

0216

1  
2 Q. Were you the person inside Alper  
3 Holdings USA, Inc. who is primarily  
4 responsible for making that deal happen?

5 A. Well, I was a direct employee of  
6 Alper Holdings USA, Inc.. I was a lone --  
7 I was -- again, in 1995, I was a direct  
8 employee of Alper Holdings USA, Inc. and I  
9 was a lone servant. I was lent to Saltire  
10 to help effect the sale of subsidiaries,  
11 Scovill Fasteners. I think your point --  
12 I was the primary person.

13 Q. Were you intimately involved with  
14 that sale?

15 A. I was intimately involved with the  
16 sale.

17 Q. Who are the investment bankers that  
18 conducted the competitive auction, if any?

19 A. We did not hire investment banking  
20 for the transaction; we conducted the  
21 auction ourselves.

22 Q. Who bid?

23 A. I have precisely -- well, there  
24 were approximately eight bidders. I  
25 believe there were at least eight bidders.

0217

1  
2 They were primarily financial bidders,  
3 such as LBO firms. We ultimately sold the  
4 company to Kohlberg & Company. I would  
5 have to review the records to recall the  
6 names of the other seven builders who  
7 didn't succeed.

8 Q. Did Kohlberg & Company have any  
9 ties at that time to Alper Holdings USA,  
10 Inc.?

11 A. None whatsoever.

12 Q. Did Kohlberg & Company have any  
13 ties to any of the owners, direct or  
14 indirect, of Alper Holdings USA, Inc.?

15 A. Not -- none that I am aware of.

16 Q. Following the sale of Scovill  
17 Fasteners -- who are the owners of Scovill  
18 Fasteners, do you know?

19 A. Following the sale of Scovill  
20 Fasteners?

21 Q. At auction.

22 A. Yes. Kohlberg & Company set up an  
23 acquisition vehicle called Kisco, I  
24 believe it's called Kisco Acquisition.  
25 They acquired the stock of Scovill

0218

1  
2 Fasteners and why they structured a

Bertellotti

particular way relates to how they run their leveraged buyout firm.

Q. Can you turn your attention to Page 7 of the financial statements that are Exhibit 8?

A. Page again?

Q. Page 7. Actually, before we get to that, did any Scovill or Alper officers -- strike that.

Did any Saltire Industrial, Inc. or Alper Holdings USA, Inc. officers or directors receive any payments in connection with the sale of Scovill Fasteners?

A. No.

Q. Do you know of any Alper or Saltire director or officer who owned any stock of Scovill Fasteners or stock option in Scovill Fasteners before you became president?

A. Of Scovill Fasteners?

Q. Yes.

A. Again, I was an employee, not

officer. But I am not aware at that time.

Q. How about right now or during the entire time you have been at Alper Holdings USA?

A. Repeat the question.

Q. Okay. Since Scovill Fasteners was sold, rather, at competitive auction?

A. Yes.

Q. As you described it in your affidavit, has any officer or director of Saltire owned any stock in Scovill Fasteners that you know of?

A. None whatsoever.

Q. Okay.

A. Do you know whether any evaluation was done of Scovill Fasteners prior to the 1995 auction, as described in paragraph 8 of your affidavit?

I would say there probably was not a formal evaluation in the sense we hired investment bank or commercial bank to do something like that. But as I said, my experience as corporate finance executive, I conducted -- my colleague and I, Jeffrey

Holdsberg, valued what the approximate value was by looking at the comparable companies as to which came up with the range of value designed the auction, two-step process, and probably there was a third bid to try to maximize the value. We relied largely on the auction.

Q. You said a third bid. There were only three bids?

A. I'm sorry; a third round of bidding. I misspoke. There were at least eight bids, to my recollection. Three

Bertellotti

14 rounds of bidding.  
15 Q. Who found Kohlberg & Company as the  
16 buyer?  
17 A. Who found them as the buyer?  
18 Q. Yes.  
19 A. My colleague, Jeff Holdsberg, was  
20 the one primarily responsible. Sitting  
21 here, I can't recall how many books we  
22 sent out or invitations to bid.  
23 Certainly more than the eight people who  
24 bid. But Mr. Holdsberg would have been  
25 the primary one responsible for listing

0221

1 potential bidders.  
2 Q. Do you know whether Scovill  
3 Fasteners management got ownership in  
4 Scovill Fasteners?  
5 A. During our period or after we sold  
6 it?  
7 Q. After you sold it.  
8 A. I have no personal knowledge as to  
9 who did. I understand they probably  
10 participated. Would be standard in that  
11 type of transaction if they would have  
12 gotten some type of equity-linked  
13 incentive with respect to the new  
14 ownership, but I don't know precisely.  
15 Very possible.  
16 Q. But did anyone at Alper, whether  
17 director or an employee, retain any  
18 ownership in Scovill Fasteners after the  
19 '95 auction?  
20 A. None whatsoever. It was a sale of  
21 100 percent.  
22 Q. Do you know anything about Scovill  
23 Fasteners operations after the sale  
24 referred to in your affidavit?  
25

0222

1  
2 A. I know very general facts.  
3 Q. Do you know whether it was later  
4 sold?  
5 A. I do know that.  
6 Q. Do you know what price it was sold  
7 for?  
8 A. I know approximately the price it  
9 was sold for.  
10 Q. What was that?  
11 A. When you say price, you want to  
12 define -- equity value, enterprise value,  
13 what are you thinking?  
14 Q. Well, I mean, was it sold to  
15 Mr. Kohlberg's company for about \$41  
16 million?  
17 A. The equity value was approximately  
18 \$41 million.  
19 Q. Was it later sold, approximately  
20 two years later, to an investment group  
21 for approximately \$140 million?  
22 A. I don't think your numbers are  
23 correct. It was sold. My understanding,  
24 Kohlberg sold it to a company, an

Bertellotti

25 investment group called Saratoga Partners.  
0223

1  
2 And, again, I think you need to compare  
3 equity value to enterprise value,  
4 potential appraisal value. It was sold  
5 for a substantially higher price.  
6 Frankly, it was quite surprising.

7 I also had the opportunity to  
8 review the bond-offering document  
9 associated with Saratoga Partners' sale,  
10 and clearly what Kohlberg had done, they  
11 had done, I believe, two and possibly  
12 three acquisitions subsequent to their  
13 purchase from us, which substantially  
14 changed the business and altered Scovill  
15 Fasteners.

16 Furthermore, I understand Kohlberg  
17 & Company may have been sued with respect  
18 to the sale to Saratoga Partners --

19 Q. What was the equity value of that  
20 sale?

21 MR. LUCAS: Wait. Don't  
22 interrupt him. Go ahead and  
23 finish your answer.

24 BY MR. STEWART:

25 Q. Go ahead.  
0224

1  
2 A. I lost my train of thought. Also,  
3 my understanding is that Saratoga Partners  
4 may have sued Kohlberg & Company with  
5 respect to the sale precisely because they  
6 felt they had overpaid.

7 Q. Do you know the equity that was in  
8 that deal?

9 A. In which deal?

10 Q. In the deal whereby Scovill  
11 Fasteners was sold to Saratoga Partners?

12 A. It appears -- again, it's  
13 impossible to answer that question but I  
14 don't know precisely how Kohlberg &  
15 Company capitalized the company. I do  
16 have, as I said, this bond offering  
17 document that goes through some of that  
18 stuff but very difficult to tell you  
19 precisely what they may have received.

20 Q. So you don't have any idea?

21 A. I am not going to speculate.

22 Q. Go ahead and speculate.

23 A. Well, on the condition that it's  
24 speculation; I am not absolutely certain.  
25 Kohlberg may have received as much as \$100

0225  
1 million with respect to their equity.

2 Q. And the equity that Scovill  
3 received was \$41.5 million?

4 A. That is approximately right.

5 Q. Can you look now on Page 7 of the  
6 financial statements -- wait a minute.  
7 Hold on.

8  
9 Okay. Who came up with the

Bertellotti

10 strategy for purchasing Alper Ink?  
 11 Let me rephrase that. Who came up  
 12 with the strategy for taking funds and  
 13 purchasing incorporated companies to roll  
 14 them up into what became Alper Ink?

15 A. The officers of the prior --  
 16 officers prior to my tenure of Saltire  
 17 Industrial.

18 Q. You are not for sure which person?

19 A. I believe it was Nicholas Combemale  
 20 and Jeffrey Holdsborg.

21 Q. And do you know which companies  
 22 were purchased?

23 A. Do I know which companies were  
 24 purchased?

25 Q. Yes.

0226

1  
 2 A. Roughly, I probably remember five  
 3 of the six or seven.

4 Q. Can you quickly run down --

5 A. Company purchased RKR Graphics.

6 Q. Okay?

7 A. Progressive Ink, CZ Ink. There are  
 8 others and they are escaping me for the  
 9 moment.

10 Q. Do you know what the total amount  
 11 paid for these various purchases by Alper  
 12 Ink was?

13 A. Enterprise value, equity value,  
 14 what are you talking about?

15 Q. Equity value.

16 A. I don't, sitting here right now.

17 Q. How would I find that out?

18 A. We should be able to find that  
 19 through the financial statement, audited  
 20 financial statements. I would say  
 21 probably in the order of, magnitude of 30,  
 22 \$50 million in the aggregate.

23 Q. In those various deals in which  
 24 incorporated groups were purchased, who  
 25 was the buyer?

0227

1  
 2 Was it Alper Holdings USA, Inc.?

3 A. No. Well, it was Saltire  
 4 Industrial -- was probably the Alper Ink  
 5 Group. It was Saltire who created a  
 6 subsidiary. The subsidiary did the  
 7 acquisition.

8 Q. Did Alper Holdings USA, Inc.  
 9 acquire these companies and then transfer  
 10 to Alper Ink?

11 A. Not to my knowledge, never.

12 Q. Did they ever -- Alper Holdings  
 13 USA, Inc. -- ever acquire one of these  
 14 companies and transfer to Saltire?

15 A. Never to my knowledge.

16 Q. Okay. Did Alper USA, Inc. execute  
 17 any of the documents whereby Scovill  
 18 Fasteners was auctioned?

19 A. Scovill Fasteners was auctioned?

20 Q. Yes.



Bertellotti

21 A. Not to my knowledge. It never  
22 should have done that.

23 Q. Are all the purchase agreements  
24 related to the Alper Ink acquisitions that  
25 we discussed at your headquarters?

0228

1

2 A. Yes, they are.

3 Q. By headquarters, I mean --

4 A. 800 Third Avenue.

5 Q. Okay. All the subsidiaries we are  
6 talking about, has any -- strike that.

7 Could you tell me now, referring to  
8 the financial statements, Page 7, could  
9 you look at H, Paragraph H?

10 A. Yes.

11 Q. Could you just explain to me what  
12 these compensation agreements involve?

13 A. Yes, this is -- let me finish  
14 reading it. (Reading.)

15 Yes. Specifically this is relating  
16 to an agreement that Mr. Holdsberg,  
17 Jeffrey Holdsberg had; that it was some  
18 type of equity incentive program related  
19 to Alper Ink Group.

20 Q. Okay. How much was he paid?

21 A. I believe he was paid approximately  
22 \$300,000 in respect to that agreement.

23 Q. Were any other officers or  
24 directors paid any money out of the  
25 operating sale?

0229

1

2 A. Not with respect to these  
3 agreements.

4 Q. Okay. Well, when Alper Ink was  
5 sold in 2000, did you receive any  
6 compensation directly to the Alper Ink  
7 sale?

8 A. I did not receive any compensation  
9 directly tied to the Alper Ink Group sale.

10 Q. Did any officer director of Alper  
11 Holdings USA, Inc. receive any  
12 compensation related to the Alper Ink  
13 sale?

14 A. Yes, two or three individual --  
15 well, only two of them were officers.  
16 There were two other individuals that were  
17 not officers, that I had referred to them  
18 earlier as people who were lone servants  
19 acting as senior officers of Alper Ink  
20 Group. They received compensation  
21 relating to the Alper Ink Group sale.

22 Q. Who are they and how much did they  
23 get?

24 A. Jeffrey Holdsberg, David Rankin,  
25 Robert Van Liederkerke, Christopher Beck,

0230

1

2 and Christopher Locke.

3 Q. Were these all employees of Alper  
4 Holdings USA, Inc.?

5 A. They were direct employees. They

Bertellotti

6 were on the payroll for administrative  
7 purposes of Alper Holdings USA, Inc.,  
8 although as I said earlier, they -- the  
9 vast majority of their time and service  
10 were dedicated to the Alper Ink Group.

11 Q. And how much did they receive, sum  
12 total as a group, out of the proceeds of  
13 the Alper Ink sale in 2000?

14 A. Somewhere in excess of a million  
15 dollars in aggregate, and some were  
16 probably less than \$1.5 million.

17 Q. Okay. Let's turn to Paragraph 13  
18 of your affidavit.

19 What was your personal involvement  
20 with the Realty Holdings, Inc. loan  
21 referred to in that paragraph?

22 A. In terms of what I say in 13, none  
23 whatsoever.

24 Q. What's the basis for your statement  
25 there?

0231

1  
2 A. What is the factual basis? Factual  
3 basis, it's part of the bankruptcy record.  
4 It's clear in the bankruptcy documents  
5 that loan originated in the plan of the  
6 reorganization.

7 Q. Do you have any idea what the  
8 underlying impetus for the loan was?

9 A. I do not. I also might add that  
10 loan is not originally made. Saltire  
11 never advanced a penny with respect to  
12 that loan. The predecessor corporation  
13 did.

14 Q. Which predecessor corporation was  
15 that?

16 A. I believe it's called First City  
17 Diversified, but Saltire did not make that  
18 loan. Saltire succeeded to its position  
19 through merger. It's all in the  
20 bankruptcy documents.

21 Q. But the loan became the debt from  
22 Realty Holdings -- as a liability for  
23 Realty Holdings and asset of Saltire?

24 A. That's correct. They're both  
25 succeeded to their respective interests.

0232

1  
2 Q. Do you know the terms of the note?  
3 A. Specifically, sitting here, I do  
4 not.

5 Q. Okay. Was Saltire entitled to call  
6 the note?

7 A. I do not know.

8 Q. So you don't know whether Saltire  
9 was entitled to a demand of the funds that  
10 had been loaned?

11 A. Not without referencing the note  
12 specifically.

13 Q. How much was the loan for -- was  
14 the face value of the loan?

15 A. My recollection is approximately  
16 \$5.6 million.

Bertellotti

17 Q. \$5.6 million loaned, at least, back  
18 in '92?

19 A. Yes.

20 Q. What was the interest rate?

21 A. I don't recall specifically.

22 Q. Do you know if it was fixed or  
23 variable?

24 A. I don't recall.

25 Q. Do you know whether it required  
0233

1  
2 payments over time?

3 A. I believe it did but I don't recall  
4 a specific term.

5 Q. Okay. Do you know -- were you  
6 personally involved in the \$3.1 million  
7 payment described in Paragraph 15 of your  
8 affidavit?

9 A. I was not an officer of the  
10 companies at that time because that was  
11 1995, if I recall, and so I was not privy  
12 to those kind of things. But I have since  
13 reviewed documents where I have seen  
14 evidence the \$3.1 million was paid in  
15 1995.

16 Q. What documents have you reviewed?

17 A. Financial statements.

18 Q. Of what company?

19 A. Saltire Industrial.

20 Q. And do you know the exact date when  
21 that \$3.1 million was paid by Realty  
22 Holdings?

23 A. It was paid -- I don't know the  
24 precise dates. There were two payments  
25 during the course of 1995 aggregating \$3.1  
0234

1  
2 million.

3 Q. Do you know what approximate dates  
4 of those payments were?

5 A. Within the year 1995, I do not.

6 Q. Do they coincide with purchases  
7 relating to the entities that became Alper  
8 Ink?

9 A. No idea.

10 Q. Do you know what --

11 A. It's unlikely because Alper --  
12 Scovill Fasteners was sold in 1995. I  
13 think the first acquisition with respect  
14 to Alper Ink Group was -- may have been  
15 '95, but most of it certainly took place  
16 subsequent to '95. But I don't know.

17 Q. Do you have any idea why Realty  
18 Holdings paid that \$3.1 million in 1995?

19 A. They owed the money, and evidently  
20 had liquidity sufficient to pay.

21 Q. Do you know where that liquidity  
22 came from?

23 A. I do not.

24 Q. Do you know what business Realty  
25 Holdings, Inc. was involved in at the  
0235

Bertellotti

2 time?

3 A. No. At that point in time it did  
4 not seem to have any operations or assets.  
5 It certainly existed for a purpose,  
6 probably dates well back to my involvement  
7 with the company.

8 Q. Do you know whether -- let me make  
9 sure I understand. For example, didn't  
10 Alper Ink buy Bagcraft in 1995?

11 A. It never bought Bagcraft.

12 Q. It never did?

13 A. No.

14 Q. Did Realty Holdings make any  
15 payments other than the \$3.1 million  
16 listed in Paragraph 15 of your affidavit?

17 A. With respect to this loan we are  
18 talking about?

19 Q. Yes.

20 A. Not to my knowledge.

21 Q. Do you know what it did -- okay.

22 Do you know what the money had been used  
23 for after it was loaned, what the loan  
24 that you referred to in Paragraph 14 and  
25 15?

0236

1

2 A. That originated in 1992 as part of  
3 the bankruptcy?

4 Q. Yes.

5 A. No, I do not.

6 Q. Did you as president of Saltire  
7 ever analyze that asset of Saltire?

8 A. Yes, prior to writing, and yes, and  
9 decided to wait. It was insolvent.

10 Q. Can you tell me -- I take it Realty  
11 Holdings -- did Realty Holdings ever have  
12 an address other than Al -- other than the  
13 address that's the same address as that  
14 for Alper Holdings USA, Inc.?

15 A. Possibly, I don't know.

16 Q. You don't know. Have you ever  
17 known that Realty Holdings had lawyers or  
18 accountants different than those that  
19 represented Alper Holdings USA, Inc.?

20 A. It's possible they did.

21 Q. But you don't know?

22 A. I don't know.

23 Q. Tell me what U.S. GAAP provision  
24 you are referring to in Paragraph 16 of  
25 your affidavit.

0237

1

2 A. I am not going to cite it. In  
3 general, I am not a certified public  
4 accountant. I am familiar with the  
5 accounting practices as well as financial  
6 statements. GAAP requires that you record  
7 various assets at the lower of cost or  
8 market. Okay. It also requires that you  
9 take a reserve for doubtful accounts, such  
10 as accounts receivables that you don't  
11 think you can collect. This was a loan  
12 which was doubtful as to its collection.

Bertellotti

13 The company that owed the money was  
14 insolvent. Eventually paid it all, it  
15 being paid \$3.1 million and, therefore,  
16 took a reserve against the amount  
17 reflecting its uncollectibility and its  
18 diminished and impaired value.

19 Q. Okay. Want you to refer to the  
20 financial statements. When you wrote off  
21 the Realty Holdings loan -- strike that.

22 When you wrote off the Realty  
23 Holdings loan, what was the value of the  
24 asset before you wrote it off?

25 A. I believe \$5.2 million. It's in  
0238

1  
2 here, 5.1.

3 Q. Is it \$5.138 million?

4 A. I believe so.

5 Q. On Saltire's 1998, '99 financial  
6 statements, would that have stood as an  
7 asset worth somewhere upwards of \$5.1  
8 million?

9 A. I believe so.

10 Q. Can you tell me whether or not your  
11 financial statement at Page 6, Section F,  
12 impairment of loan life assets articulates  
13 your understanding of GAAP insofar as it  
14 relates to the Realty Holdings, Inc. loan?

15 MR. SCOTT: Object to the  
16 form of that question.

17 BY MR. STEWART:

18 Q. You can go ahead and answer it.

19 A. What is your question? It says  
20 precisely what it says. What is the  
21 question?

22 Q. When you are talking about U. S.  
23 GAAP, is the U. S. GAAP you are referring  
24 to in Paragraph 16 of your affidavit, is  
25 that essentially articulated, that  
0239

1  
2 principal you are referring to,  
3 articulated in Section F Section 2-F of  
4 your financial statements?

5 A. Not necessarily. It may very well  
6 be. As I said before, I am not a  
7 certified public accounts. I have been  
8 working with accountants and financial  
9 statements for a long time. I gave you my  
10 general understanding of GAAP without  
11 citing the specific provision. I consult  
12 with the CFO who is a public accountant.  
13 Write it out in accordance with GAAP  
14 whichever FASB pronouncement or APB that's  
15 relevant is what is done in accordance  
16 with --

17 Q. But you can't tell me what that  
18 FASB pronouncement is?

19 A. Specifically, I don't know.

20 Q. Do you really think there's a FASB  
21 pronouncement addressing the writing off  
22 of loans of this type?

23 A. Absolutely.

Bertellotti

Q. Can you tell me why that investment wasn't written off prior to 2000?

A. I don't have an answer to that question. It's entirely possible it wouldn't have been appropriate to write it off earlier.

Q. Did you ever have any discussions with anyone, any officer or director of Saltire or Alper Holdings USA, Inc., in which you discussed calling that loan and getting Saltire's money back?

A. No. We obviously reviewed the financial condition of Realty Holdings and it was unable to pay. It was insolvent.

Q. When did you review the financial condition of Realty Holdings?

A. We review it routinely, annual basis, and the financial statements. We certainly reviewed at the end of 2000 and made that decision.

Q. Would you agree Realty Holdings was not insolvent in 1995?

A. I believe -- in 1995? Why are you picking 1995?

Q. Because Realty Holdings paid, according --

A. They could have easily been insolvent in '95. Simply because they have money doesn't mean they aren't insolvent.

Q. Well, I guess what I would say, if I were to look at Saltire Industrial, Inc.'s financial statements for 1995, would I have found anything to indicate that Realty Holdings, Inc. was insolvent at that time?

A. Without seeing the specific statements, I cannot answer that question.

Q. I am going to hand you --

MR. STEWART: Will you mark this as an exhibit?

(Whereupon Exhibit 14 is Marked.)

BY MR. STEWART:

Q. We may have already addressed it. I would like to you look at the documents and tell me if you ever reviewed them.

A. I reviewed them subsequent to your filing.

Q. Do you have any direct personal

knowledge about the letters and documents that are listed in that binder?

MR. LUCAS: Object to the form; it's too broad.

THE WITNESS: Since I said I reviewed these subsequent to your filing, I don't recall

Bertellotti

9 seeing these letters before.  
10 It's possible. But to my  
11 knowledge, I don't have any  
12 direct personal knowledge of  
13 these documents.

14 BY MR. STEWART:

15 Q. Now, did you see -- I will turn  
16 your attention -- I am afraid I only have  
17 one copy -- did you see, for example, the  
18 master agreement that is at Tab 3, Bates  
19 Number S04125?

20 A. Yes, I do.

21 Q. Do you see it's between First City  
22 US Corp. And ICF Kaiser Engineers?

23 A. Yes.

24 Q. Do you have -- first of all, did  
25 you, before you saw this document when we

0243

1 filed it, have any familiarity with this  
2 particular agreement?

3 A. No, I did not.

4 Q. Were you involved in entering into  
5 the agreement?

6 A. Obviously not.

7 Q. Do you know -- can you tell me  
8 whether First City US Corp. is a  
9 corporation that exists today?

10 A. First City Corporation does not  
11 exist today; it's been dissolved.

12 Q. Was it dissolved in the form of  
13 Realty Holdings, Inc.

14 A. I believe so.

15 Q. Your understanding, First City US  
16 Corp. was Realty Holdings' predecessor?

17 A. I believe so, based on the  
18 corporate documents you filed.

19 Q. Do you see on Tab 4 a reference to  
20 First City Capital Corporation?

21 A. Yes, I do.

22 Q. Is that a company you are familiar  
23 with?

24 A. I believe so.

0244

1 Q. Do you know what the current status  
2 of First City Capital Corporation is?

3 A. I believe it's dissolved.

4 Q. Now, do you know anything about the  
5 relationship between First City Capital  
6 Corporation and First City Industries at  
7 the time this letter was written on May  
8 26, 1992?

9 MR. MAY: Object to the  
10 form.

11 THE WITNESS: Other than  
12 the corporation separate and  
13 distinct. They are separate  
14 corporations. First City  
15 Capital -- First City Industries  
16 is not a successor of these  
17 industries.

18 BY MR. STEWART:

Bertellotti

Q. Do you know if First City Capital Corporation was a first or second -- do you know whether or not First City Capital Corporation in May 26, 1992 was a subsidiary of First City Industries?

A. I believe it was a subsidiary for

First City Industries.

Q. Do you know if First City US Corp. referred to in the agreement that is at Tab 3, was a subsidiary of First City Industries on January 1, 1992?

A. That date, I do not know. That specific date, I don't know specifically.

Q. Do you know what the corporate officers of First City US Corp. were in 1992?

MR. SCOTT: Who they were or what they were?

MR. STEWART: What they were.

THE WITNESS: Where they were? What is --

MR. SCOTT: Object to the form.

MR. STEWART: I will repeat myself.

MR. SCOTT: I think you misspoke. But you might not have.

BY MR. STEWART:

Q. What I want to know, do you know where the headquarters of First City US Corp. was located in January '92?

A. I do not.

Q. Do you know where?

MR. LUCAS: Excuse me just one minute, Michael. I would ask you to go ahead and resume your seat. I don't think you need to be hovering over the witness asking him.

MR. STEWART: Mr. Lucas, you of all people should hardly be criticizing an attorney hovering over the witness, and I will sit down in a moment.

MR. SCOTT: You are also between the Court Reporter and witness. She is having trouble, I think, following.

MR. LUCAS: You can ask him these questions referring to the document. You don't have to be standing at his shoulder.

MR. MAY: Here is a set of documents you can sit in the seat and use the same.



5 Bertellotti  
6 MR. STEWART: We are almost  
7 done with the line of  
8 questioning.

9 BY MR. STEWART:

10 Q. Tell me if you know where First  
11 City Capital Corporation was headquartered  
12 at the time, May 26, '92, this was  
13 written?

14 MR. LUCAS: Will you honor  
15 my question and go ahead and sit  
16 down?

17 MR. STEWART: Once I finish  
18 this question I will, Mr. Lucas,  
19 yes.

20 THE WITNESS: I do not  
21 where their headquarters was.

22 BY MR. STEWART:

23 Q. Okay. Do you know what the  
24 officers -- who the officers of First City  
25 US Corp. were in May 1992?

0248 A. I do not.

1 Q. Do you know who the officers of  
2 First City Industries were in May 1992?

3 A. I do not.

4 Q. Do you know who the officers of  
5 First City Capital Corporation were in  
6 1992?

7 A. I do not.

8 Q. Do you know who the directors for  
9 First City Industries were in -- in May of  
10 1993?

11 A. May of -- no, I do not.

12 Q. Do you know who the directors for  
13 First City Capital Corporation were at  
14 that time?

15 A. May of '93, First City Capital  
16 Corporation, I do not.

17 Q. Do you know who the directors of  
18 First City US Corp. Were at that time?

19 A. I do not.

20 MR. STEWART: Let's take a  
21 three minute break.

22 (Whereupon a Recess is  
23 Taken.)

24 BY MR. STEWART:

0249 1  
2 Q. Back on the record. Mr.  
3 Bertellotti, with regard to the documents  
4 that you looked at on Exhibit 14, is it  
5 fair to say that you do not know whether  
6 in the period prior to September '93,  
7 First City Industries' subsidiaries were  
8 actually independent of First City in a  
9 true sense, or were they acting as First  
10 City alter egos?

11 MR. SCOTT: Objection to  
12 the form of the question. It's  
13 asking for legal opinion and  
14 legal --

15 MR. STEWART: No, it's

16 Bertellotti  
17 asking for a factual analysis. I  
18 want to know.

19 THE WITNESS: My opinion,  
20 they are all separate, distinct,  
21 independent organizations that  
22 acted in their own interest.

23 BY MR. STEWART:

24 Q. Is that, for the period at least  
25 before September '93, opinion simply based  
on the fact that you have seen documents

0250

1  
2 that suggest they have separate corporate  
3 form?

4 A. Yes. I know Mr. Crum and  
5 Mr. Robbins also exercised appropriate  
6 procedures. We succeeded in the  
7 management positions to some of these  
8 people. To my knowledge, they always did  
9 things correctly.

10 Q. Do you know of any time in Saltire  
11 Industrial's history in which it has had  
12 the power to direct First City U.S. or  
13 First City Corporation to do anything on  
14 its behalf?

15 A. I would never do some --

16 Q. Has it had the power?

17 MR. STEWART: Don't coach  
18 the witness.

19 I do mind. You certainly  
20 can make the objection,  
21 Mr. Scott.

22 MR. SCOTT: If you be  
23 quiet, I will.

24 Object to the form of the  
25 question, because it calls for

0251

1  
2 opinions and he's not qualified  
3 to make --

4 MR. LUCAS: Well, while we  
5 are at a pause, don't interrupt  
6 me. When you keep interrupting  
7 people -- Tom was trying to make  
8 an objection, you start talking  
9 over his objection, and she can't  
10 get the answer or anything else  
11 while everybody is talking.  
12 Don't interrupt me, Mike.

13 MR. STEWART: John --

14 MR. LUCAS: Mike, don't  
15 interrupt.

16 MR. STEWART: I think we  
17 are done.

18 MR. LUCAS: Try to develop  
19 the habit for the rest of the  
20 afternoon of not interrupting  
21 people when they are in the  
22 middle of an answer or making  
23 objection. Let's go on.

24 MR. STEWART: Frankly, I  
25 don't think I have interrupted

0252

Bertellotti

1 anyone, and certainly didn't  
2 interrupt the witness.

3 Other than people making  
4 speaking objections, of course,  
5 that is inappropriate.

6 MR. LUCAS: I'm not going  
7 to argue with that on the record,  
8 but just get on with the factual  
9 questions sometime before the end  
10 of the day.

11 MR. SCOTT: Factual basis  
12 of an opinion objection is not.

13 MR. STEWART: You are  
14 wasting our time here. If you  
15 will, let the deposition  
16 continue. State your objections  
17 or don't. Let's proceed.

18 BY MR. STEWART:

19 Q. All I am saying, do you know of any  
20 time when Saltire had parental control  
21 over First City U.S.?

22 A. No.

23 Q. Do you know of any time when  
24 Saltire had parental control over Realty

0253 1 Holdings, Inc.?

2 A. No, I do not.

3 Q. Do you know of any time First City  
4 Industries had parental control -- excuse  
5 me, strike that.

6 Do you know of any time which  
7 Saltire Industrial, Inc. had parental  
8 control over First City Capital  
9 Corporation?

10 MR. SCOTT: Object to the  
11 form of the question.

12 BY MR. STEWART:

13 Q. Answer the question.

14 A. I do not know of a time when  
15 Saltire Industrial, Inc. had parental  
16 control over First City Capital, Inc.

17 Q. You don't know, or do you know of  
18 any time when Saltire Industrial, Inc. had  
19 parental control over First City Capital  
20 Corporation?

21 MR. SCOTT: Object to the  
22 form.

23 BY MR. STEWART:

24 Q. Answer the question.

0254 1 A. I do not.

2 Q. Let's turn quickly to your  
3 affidavit, your first affidavit, which is  
4 an Exhibit before you.

5 A. Turn to where?

6 Q. The first affidavit that you  
7 provided, which I believe is Exhibit 3 or  
8 4?

9 A. Number 4.

10 Q. Let me ask you this. For any

Bertellotti

12 statements that refer to periods prior to  
13 your employment at Alper Holdings USA,  
14 Inc. in 1993, can we assume that your  
15 statement is based on the same type of  
16 discussions and documents that you  
17 described in relation to the affidavit  
18 that is Exhibit 2?

19 A. Generally, I think we are safe to  
20 assume that.

21 Q. Now turn to the second page of the  
22 affidavit, Paragraph 9. You are saying  
23 November 1992, Alper acquired control of  
24 the indirect parent of Scovill; do you see  
25 that?

0255

1

2 A. Yes, I do.

3 Q. Now that you're thinking about  
4 that, is the correct statement that Alper  
5 acquired the direct parent of Scovill?  
6 Hm?

7 A. I would need to refer to a  
8 corporate or -- corporate structure for  
9 1992. I assume this statement is true.

10 Q. When you say indirect, what do you  
11 mean?

12 A. There could be a legal corporation  
13 in between.

14 Q. So in other words, is what you are  
15 saying in Paragraph 9 that you believed  
16 that Scovill acquired control of a parent  
17 company of a subsidiary which controlled  
18 another subsidiary, which was Scovill?

19 A. Your question is nonsensical. I  
20 have no idea what you are talking about.

21 Q. It's not nonsensical. Did you -- I  
22 will phrase it more simply.

23 When you say that Alper acquired  
24 control of the indirect parents of  
25 Scovill, when you say indirect parent, do

0256

1

2 you mean a parent separated from Scovill  
3 by another wholly owned subsidiary?

4 A. That is what this statement says,  
5 yes, implies.

6 Q. Okay. So if, in fact, First City  
7 Industries was the direct parent of  
8 Scovill, then this statement would be  
9 incorrect; is that right?

10 A. It's possible that would make it  
11 incorrect. Again, without reviewing the  
12 precise bankruptcy recordings, it's -- I  
13 couldn't answer that absolutely. It's a  
14 possibility.

15 Q. I know -- are you referring to the  
16 bankruptcy documents that you described a  
17 number of times during the deposition?

18 A. The bankruptcy documents relating  
19 to First City Industries' 1992 bankruptcy.

20 Q. Tell me, do you see on Paragraph 11  
21 you say, I never participated or exercised  
22 control over the finances, human

Bertellotti  
resources, and general business practices  
of Scovill?

A. Yes.

Q. I am confused. Aren't those very  
activities the activities that are  
specifically described in your management  
agreement as performed by Alper?

A. Yes. Alper never exercised control  
over the finances, human resources, or  
general practices of resource -- Alper  
didn't do that; Lone servants did that on  
behalf of Saltire. We effected those  
things as officers of Saltire, separate  
and distinct from Alper.

Q. Mr. Bertellotti, can you tell me  
why in your sworn affidavit, you didn't  
feel the need to mention the management  
agreement or this new answer?

MR. LUCAS: Objection.

MR. SCOTT: Argumentative.

MR. LUCAS: Argumentative.

THE WITNESS: It's in the

record.

MR. STEWART: The question  
is argumentative. I object to --

BY MR. STEWART:

Q. I would like you to answer.

A. Management agreement was in your  
records well in advance of this affidavit.  
You discovered it, I believe, in December  
2001.

Q. Have you provided to the court with  
this affidavit?

A. Did not.

Q. Tell me, have you talked to Mr.  
Crum lately?

A. No.

Q. Have you talked to any other formal  
employees of Alper Holdings USA, Inc.  
within the last five months about this  
case?

A. No, with the exception of  
Mr. Coghlin.

Q. Is Saltire planning to declare  
bankruptcy in the near future? We are  
back to that issue.

MR. LUCAS: We are back to  
that issue. Give us a break. I  
want to discuss that with people  
involved.

MR. STEWART: That is fine.

MR. LUCAS: Privilege  
issues.

(Whereupon Question is Read  
Back.)

THE REPORTER: Question, Is  
Saltire planning to declare

8 Bertellotti  
9 bankruptcy in the near future?  
10 We are back to that issue.  
11 THE WITNESS: Saltire has  
12 no plans to declare bankruptcy at  
13 this time.  
14 BY MR. STEWART:  
15 Q. Have you retained counsel to plan  
16 the bankruptcy at Saltire?  
17 MR. LUCAS: You are  
18 invading the attorney-client  
19 privilege on that.  
20 MR. STEWART: Don't think I  
21 am, but I will tell you what.  
22 Obviously, we are going to  
23 provide you written discovery to  
24 get all the documents which we  
25 received today. I think we can  
address this in written discovery

0260

1 and you can respond and assert  
2 your privilege. That way, we can  
3 pull the cases to see who is  
4 correct.  
5 BY MR. STEWART:  
6 Q. Let's move on to Mr. Smith's  
7 deposition. I am going to leave this  
8 deposition open. Obviously, the documents  
9 weren't provided, and once we get the  
10 documents we will review it and I assume  
11 we will be coming back to New York in  
12 November.  
13 But I will say, as long as we are  
14 making statements I want to designate this  
15 deposition under protective order and if I  
16 had -- under our protective order as  
17 confidential under the protective order.  
18 MR. STEWART: We have no  
19 objection.  
20 MR. LUCAS: So when you  
21 prepare the deposition, it should  
22 be in a sealed envelope and  
23 treated as confidential. In view  
24 of Mr. Stewart's statement on the  
25

0261

1 record, I am compelled to say we  
2 view the deposition as closed.  
3 We have been very lenient today  
4 in not holding you to the  
5 representations that were made in  
6 court to the effect this was  
7 going to be one of three  
8 depositions taken in half a day  
9 and that it was going to be under  
10 the jurisdictional issues. You  
11 have obviously gone far afield  
12 from that from objections from  
13 us, so we view this deposition as  
14 complete.  
15 MR. SCOTT: And I want to  
16 say there was absolutely and was  
17 no requirement for us to produce  
18

Bertellotti  
any documents pursuant to that  
defective notice of a deposition  
duces tecum, not to the party but  
to the individual, that issue in  
addition having a subpoena or  
even giving us a Rule 34 request  
and asking to have the time, the

notion we were supposed to  
produce documents is ridiculous.  
(The Deposition was  
Concluded at 2:54 p.m.)

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, the undersigned, declare under penalty  
of perjury that I have read the foregoing  
transcript, and I have made any  
corrections, additions or deletions that I  
was desirous of making; that the foregoing  
is a true and correct transcript of my  
testimony contained therein.  
EXECUTED this \_\_\_\_\_ day of

\_\_\_\_\_,  
20\_\_, at \_\_\_\_\_, \_\_\_\_\_  
(City) (State)

\_\_\_\_\_  
ROBERT BERTELLOTTI

C E R T I F I C A T E

Bertellotti

I, SANDIE ARIELLE SANTOS, a Notary  
Public and Certified Shorthand Reporter,  
do hereby certify that the foregoing is a  
true and accurate transcript of the  
testimony as taken stenographically by and  
before me at the time, place and on the  
date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither  
a relative nor employee nor attorney nor  
counsel of any of the parties to this  
action, and that I am neither a relative  
nor employee of such attorney or counsel,  
and that I am not financially interested  
in the action.

---

SANDIE ARIELLE SANTOS  
Certified Shorthand Reporter

0265

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**TAB 7**

Bauer1

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2                   JUDICIAL DISTRICT  
3                   DICKSON COUNTY, TENNESSEE

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22            respective parties: Bauer1

2

1 APPEARANCE OF COUNSEL:

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13 ALSO PRESENT

14 STEPHEN CRITER, Video Specialist

15 - 0 -

16 I-N-D-E-X

17                      Witness:    Page:

18 Nicholas B. Bauer

19 Examination by Mr. Stewart 5

20 - 0 -

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1	Exhibits: (Not included with transcript) Page:	
2	Exhibit No. 31 for Identification	
3	to the Bauer Deposition	
	(Notice of Deposition)	6
4	Exhibit No. 32 for Identification	
5	to the Bauer Deposition	
	(Agreement)	163
6	Exhibit No. 33 for Identification	
7	to the Bauer Deposition	
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8	Exhibit No. 34 for Identification	
9	to the Bauer Deposition	
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10	Exhibits Nos. 34A & 34B for	
11	Identification to the Bauer Deposition	
	(Letters)	219
12	Exhibits Nos. 35 & 36 for	
13	Identification to the Bauer Deposition	
	(Blow-ups of maps)	226

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Bauer1

3 deposition of Nicholas B. Bauer noticed by the  
4 plaintiffs in the case number 373A-CV in the case  
5 of George Harold Norman, et al. versus Scovill,  
6 Incorporated, et al, in the Circuit Court for the  
7 23rd Judicial District, Dickson County,  
8 Tennessee.

9 This deposition is taken on February 22,  
10 2001, at the offices of Hunton & Williams, 1751  
11 Pinnacle Drive in Virginia.

12 The time is noted on the bottom portion  
13 of the television screen.

14 The videographer operating the videotape  
15 equipment for this deposition is Steven Criter of  
16 Carol J. Thomas Reporting.

17 The court reporter is Kathy Boyd of  
18 Carol J. Thomas Reporting.

19 Will counsel please identify themselves  
20 and the parties they represent?

21 MR. STEWART: Mike Stewart of Waller  
22 Lansden Dortch & Davis for the plaintiffs.

5

1 MR. LUCAS: John Lucas of Hunton &  
2 Williams for the defendant.

3 MR. PERRY: Charles Perry of Hunton &  
4 Williams for the defendant.

5 THE VIDEO SPECIALIST: Swear the  
Page 4

Bauer1

6 witness, please.

7 whereupon,

8 NICHOLAS B. BAUER,

9 having been duly sworn by the Notary Public, was

10 called as a witness herein, and testified as

11 follows:

12 THE VIDEO SPECIALIST: Okay.

13 EXAMINATION BY COUNSEL FOR THE

14 PLAINTIFFS

15 BY MR. STEWART:

16 Q. Please state your name.

17 A. Nicholas Bauer.

18 Q. Mr. Bauer, I'm Mike Stewart, and could

19 we agree that as I'm asking you questions today,

20 if you don't understand a question, you'll tell

21 me before you answer?

22 A. Okay.

6

1 Q. And that way, if you do answer a

2 question, we'll know that you thought you

3 understood it?

4 A. Yes, sir.

5 Q. Okay. I'm going to hand you a notice to

6 take deposition.

7 MR. LUCAS: Can we similarly agree that

8 if he doesn't understand the question, he can ask

Page 5

Bauer1

9 you for clarification?

10 MR. STEWART: Oh, certainly.

11 BY MR. STEWART:

12 Q. I just want to hand you a Notice of  
13 Deposition.

14 Is that the notice that you were  
15 provided for this deposition?

16 (The witness reviewed the document.)

17 THE WITNESS: I believe so. To the best  
18 of my recollection, yes.

19 MR. STEWART: Okay. I'll just make that  
20 Exhibit 31.

21 (Exhibit No. 31  
22 was marked for

□

7

1 identification.)

2 BY MR. STEWART:

3 Q. Mr. Bauer, pursuant to that notice or  
4 for any other reason, have you brought any  
5 documents today?

6 A. No, I have not.

7 Q. Before we get into the details of your  
8 deposition, are you appearing today or are you  
9 appearing as the representative, the 3006  
10 representative of Scovill, Inc., the defendant?

11 A. No. My notice was for myself as an  
Page 6

Bauer1

12 individual, and that is how I am appearing today.

13 THE COURT REPORTER: Was that 3006

14 representative?

15 MR. LUCAS: 30 point 02 paren 6.

16 MR. STEWART: Let's go off the record for  
17 a moment.

18 THE VIDEO SPECIALIST: Off record, and  
19 the time on screen is 09 and 19:32.

20 (A discussion was held off the record.)

21 THE VIDEO SPECIALIST: On record, and  
22 the time on screen is 09:22:47.

8

1 BY MR. STEWART:

2 Q. So Mr. Bauer, you're appearing as an  
3 individual?

4 A. Yes.

5 Q. And are you right now planning to  
6 provide expert testimony in this case?

7 A. No, I'm not.

8 Q. Okay. Have you --

9 MR. LUCAS: Let me ask you this.

10 Expert, as you and I know as lawyers use it, is a  
11 term of art.

12 Can you clarify for him what you mean by  
13 that?

14 MR. STEWART: Well, perhaps the best way  
Page 7



Bauer1

15 to do this, I mean I'll ask you, we, during  
16 Claudia Brand's deposition, Scovill, Inc. was  
17 very clear to make its position known that Mrs.  
18 Brand was to be considered a non-testifying  
19 expert, and therefore, we were careful to  
20 question her about facts and not about opinions  
21 that an expert might give in the case.

22 And so the question is is, is Mr. Bauer

9

1 or are you taking the same position with Mr.  
2 Bauer, that he is a non-testifying expert and he  
3 is not here to give or will not be giving at  
4 trial expert testimony?

5 MR. LUCAS: I cannot say that at trial,  
6 that he might not, may or may not offer an  
7 opinion on something.

8 He is certainly not an expert, you know,  
9 an outside expert within the meaning of the rule.

10 But I just, I don't want to tell you and  
11 I don't want his answer to be interpreted that at  
12 trial, he might not express an opinion on whether  
13 or not it's going to snow tomorrow or something  
14 that would be within the normal scope of his  
15 duties, but that's not why he is here.

16 I mean he is here as an individual  
17 witness, and you know, and hasn't been obviously

Bauer1

18 retained or prepared as an expert witness.

19 MR. STEWART: Okay. And we would expect  
20 to receive the appropriate report and information  
21 if he was going to provide testimony about his  
22 opinions other than those expressed in the

□

10

1 environmental documents that have been provided  
2 to the EPA, as with Ms. Brand, separate from  
3 those documents.

4 MR. LUCAS: We will certainly provide  
5 you with whatever you're entitled to receive  
6 under the rules.

7 BY MR. STEWART:

8 Q. Let me ask about that, Mr. Bauer. I  
9 mean are you right now intending to come to trial  
10 or preparing for the possibility of coming to  
11 trial to testify about the source of  
12 trichloroethylene in various wells and points  
13 throughout around the site of the former Scovill  
14 Dickson Schrader Automotive plant facility?

15 A. I have not discussed that with my  
16 attorneys.

17 I don't know.

18 Q. Mr. Bauer, have you ever taken your  
19 deposition before?

20 A. Yes, I have.

Bauer1

21 Q. Tell me when.

22 A. I don't recall precise dates.

11

1 Q. Well, tell me generally when and for  
2 what you were deposed.

3 A. Approximately a year ago, I was deposed  
4 in another matter relating to waste disposal  
5 issues, and approximately eight years ago, I was  
6 deposed in a bankruptcy matter.

7 Q. See if we can take the bankruptcy matter  
8 off the table.

9 Did that have any relationship to this  
10 case?

11 A. No.

12 Q. Was that involving some personal issue  
13 for you?

14 A. No. It was a issue where I was working  
15 for a consulting firm, and we had done some work  
16 for a company that had since gone into  
17 bankruptcy, and it was tangential to the case, as  
18 I understand it, but my deposition was taken  
19 relating to the work we had done for the debtor.

20 Q. And who is we at the time?

21 A. ICF Kaiser Engineers.

22 Q. Okay. Did you give any opinions about

Bauer1

12

1 anything relating to environmental issues or  
2 hazardous waste issues?

3 A. Not that I recall.

4 Q. Okay. Were you primarily testifying  
5 about billing issues, that sort of thing?

6 A. Testifying about the work we had  
7 performed and the cost of that work.

8 Q. What kind of work was it?

9 A. I believe it was a Phase 1 audit.

10 Q. For whom was the work performed?

11 A. I don't even recall.

12 Q. Okay. Do you remember where that case  
13 was being litigated?

14 A. No, I don't. The deposition was taken  
15 locally in Washington or Northern Virginia, but I  
16 don't know where the case was being litigated.

17 Q. Did that case involve any EPA regulated  
18 site, CERCLA site, or anything like that?

19 A. Not to my knowledge.

20 Q. Okay. Tell me about your year ago  
21 deposition about disposal issues.

22 A. What in particular would you like to

Bauer1

13

1 know?

2 Q. Well, who was deposing you, what party  
3 or agency?

4 A. The counsel for Mr. Calabrese.

5 Q. And who is Mr. Calabrese?

6 A. He is a property owner, current property  
7 owner.

8 Q. An owner of property where?

9 A. In Connecticut.

10 Q. And -- excuse me.

11 A. Go ahead.

12 Q. Continue.

13 A. In Waterbury, Connecticut.

14 Q. And what did Mr. Calabrese's counsel  
15 want to ask you?

16 MR. LUCAS: Object to the form. Let me  
17 explain the reason for that.

18 Let me explain the reason for that.

19 MR. STEWART: I understand.

20 MR. LUCAS: Unless you don't want me to.

21 MR. STEWART: I'll be happy to rephrase.

22 BY MR. STEWART:

□

14

Bauer1

1 Q. What is the nature -- put it this way.  
2 Is the deposition an outgrowth of current  
3 litigation?

4 A. Yes.

5 Q. Okay. Who are the parties to that  
6 litigation?

7 A. Mr. Calabrese, to the best of my  
8 recollection, all the parties involved, Mr.  
9 Calabrese, the estate of a Mr. McHugh, Saltire  
10 Industrial, and Scovill Fasteners, Inc.

11 Q. Is Mr. Calabrese the plaintiff or the  
12 defendant?

13 A. The plaintiff.

14 Q. And what claims has he made against  
15 Saltire Industrial that you know of?

16 A. The specific claims, I don't recall in  
17 terms of the legal jargon that was involved.

18 Q. Well, what do you recall about the  
19 factual nature of the claims?

20 A. The case involved a dispute about past  
21 disposal practices on the property in Connecticut  
22 of which Mr. Calabrese is the current owner.

15

1 Q. Whose disposal practices?

2 A. Scovill Manufacturing, Inc. or Scovill  
3 Manufacturing Corporation.

Bauer1

4 Q. Which one?

5 A. I believe that's Scovill Manufacturing,  
6 Inc., but the exact title of that company, I  
7 don't, I'm not sure.

8 Q. Disposal practices by the same Scovill  
9 that is the defendant in this lawsuit?

10 A. A -- yes. It's related, yes.

11 Q. Related how? A subsidiary, or tell me  
12 how Scovill Manufacturing, Inc. relates to  
13 Scovill, Inc.

14 A. There was, through a series of mergers,  
15 acquisitions, et cetera, Scovill Manufacturing  
16 eventually, eventually the name changed to  
17 Scovill, Inc. It became Scovill, Inc.

18 Q. Scovill, Inc. and Scovill Manufacturing,  
19 Inc. had the same owners?

20 A. I'm not sure of that.

21 Q. Okay. Scovill, Inc. was a successor  
22 corporation to Scovill Manufacturing, Inc., is

□

16

1 that what you just described?

2 A. I'm not sure in terms of term of art  
3 here, but they, Scovill Manufacturing I believe  
4 was the original name or one of the original  
5 names of the company that ultimately became  
6 Scovill, Inc.

Bauer1

7 Q. Okay. Do you know when that would have  
8 happened?

9 A. No. I don't recall the dates of those  
10 transitions.

11 Q. When did the disposal on the Calabrese  
12 property we have talked about occur or when was  
13 it alleged to have occurred?

14 A. Alleged to have occurred from  
15 approximately 1919 through 1974.

16 Q. And what was allegedly disposed of?

17 A. Cinders, ash, clean fill, and related  
18 materials; there was also, there were also  
19 capacitors found at the site.

20 Q. PCBs?

21 A. Containing PCBs.

22 Q. Were there any, were there any volatile

□

17

1 organic compounds disposed of at the Calabrese  
2 site?

3 A. None have been detected there, nor do we  
4 have any information of any such compounds being  
5 disposed of there.

6 Q. Were any heavy metals disposed of there?

7 A. There were some metals identified in  
8 sampling results.

9 The, to the best of my knowledge, there



10                                   Bauer1  
11       were no heavy metal wastes disposed of there.

12               Q.    Where did Mr. Calabrese think the waste  
13       came from, that is, literally what manufacturing  
14       operation?

15                   MR. LUCAS:  Object to the form where  
16       you're asking him what someone else thinks.

17                   BY MR. STEWART:

18               Q.    Fair enough.  Do you know where it's  
19       alleged the materials disposed of at Mr.  
20       Calabrese's property came from?

21               A.    The allegation is that there is a former  
22       Scovill Manufacturing Company facility in  
      Watertown -- Waterbury -- excuse me -- Waterbury,

□

18

1       Connecticut, and wastes were allegedly, from that  
2       operation of the type we just described, were  
3       disposed of in that area.

4               Q.    What was made at the Waterbury site?

5               A.    Many different types of metal-related  
6       products, brass-related products.

7               Q.    Products similar to the products  
8       manufactured at the Scovill facility in Dickson,  
9       Tennessee?

10              A.    I don't recall whether such, whether  
11       there was a period where similar items may have  
12       been manufactured at that, at that, at that

13 Waterbury facility. Bauer1  
14 I'm not sure.  
15 Q. At the Waterbury plant, it was a metal  
16 finishing plant, is that right?  
17 A. There were many metal-type operations  
18 that went on.  
19 There was forming and finishing  
20 operations there at various times.  
21 Q. Do you know where this case brought by  
22 Mr. Calabrese is being litigated, what court?

0

19

1 A. No. I don't recall.

2 Q. Okay. Did you have your deposition

3 taken here?

4 A. No. It was taken in Connecticut.

5 Q. Were you a company representative?

6 A. In that case, yes, I was.

7 Q. And were you representing Saltire

8 Industrial?

9 A. Yes.

10 Q. Were you also representing Scovill

11 Manufacturing, Inc?

12 A. Well, Scovill Manufacturing, Inc.

13 doesn't currently exist.

14 Q. Were you noticed as a representative of,

15 30(b)(6) representative for Scovill

16                                   Bauer1  
Manufacturing, Inc. in that case?

17           A.    I don't recall.

18           Q.    Well, were you providing the company's  
19           position based on not only activities of Saltire  
20           Industrial, Inc. during its existence, but also  
21           activities of Scovill Manufacturing, Inc?

22           A.    Yes.

20

1           Q.    Okay. Do you have a copy of that  
2           deposition transcript?

3           A.    Not with me, no.

4           Q.    I understand. Do you have one in your  
5           offices or in your possession as an officer for  
6           Saltire Industrial, Inc?

7           A.    As an individual, I have a copy.

8           MR. STEWART: I would like to make that  
9           an exhibit to this deposition.

10          MR. LUCAS: We'll entertain the request.  
11          I don't think it's appropriate to make a document  
12          that's not here an exhibit.

13          MR. STEWART: So I would like to make it  
14          a late filed exhibit.

15          Is that problematic?

16          MR. LUCAS: Yeah. I mean I just don't  
17          think the rules provide for late filed exhibits  
18          for a document that's not here, not been

Bauer1

19 requested.

20 If you all want a copy of it, we'll, you

21 know, my procedure --

22 MR. STEWART: You just want us to make a

21

1 request formally in writing later?

2 MR. LUCAS: Yeah, and you know, if -- my  
3 procedure when someone requests a document during  
4 a deposition that I hadn't seen before is I want  
5 to, you know, consider the request, and if it's  
6 responsive and you're entitled to it, you will  
7 get it.

8 BY MR. STEWART:

9 Q. Is the Environmental Protection Agency  
10 involved with the site at issue in what I'll call  
11 the Calabrese litigation?

12 A. Yes.

13 Q. Is it a Superfund site?

14 A. Yes.

15 Q. How long has it been a Superfund site?

16 A. A few months.

17 Q. Okay. How long has the Environmental  
18 Protection Agency been involved with the site?

19 A. Similarly, you know, an order of months.  
20 I don't recall precisely.

21 Q. Why is the estate of Mr. McClure

22 interested in, or McHugh<sup>Bauer1</sup> interested in the

22

1 litigation?

2 MR. LUCAS: Object to the form of the  
3 question.

4 BY MR. STEWART:

5 Q. Let me rephrase. What has the-- first  
6 of all, is the estate of Mr. McHugh a party to  
7 that litigation?

8 A. My understanding is they are also a  
9 defendant in that litigation.

10 Q. Is Mr. McHugh a former independent  
11 contractor who worked for Scovill Industrial,  
12 Inc?

13 A. No.

14 Q. What has been alleged as to Mr. McHugh's  
15 involvement with the litigation surrounding the  
16 Calabrese site?

17 A. Mr. McHugh was a former owner of the  
18 property.

19 Q. Do you know what damages have been  
20 alleged in that lawsuit?

21 A. No, I don't.

22 Q. Do you know who the attorneys are that

Bauer1

23

1       deposed you?

2           A.   Nick Harding; I don't recall the name of  
3       the firm.

4           Q.   Did Saltire Industrial at your  
5       deposition admit to contaminating the property  
6       owned by Mr. Calabrese?

7           A.   No.

8           Q.   Did you admit to placing, not you  
9       personally, but to Scovill Manufacturing, Inc.'s  
10      placement of waste or materials or anything on  
11      the Calabrese site?

12           MR. LUCAS: Counsel, let me ask you just  
13      that's a compound question rolled into one.

14           If the question, the last question was  
15      did they admit to placing anything on the site?  
16      Is that the question you want to ask?

17           MR. STEWART: That's fine.

18           THE WITNESS: Okay. The response then  
19      to that question did we place anything on the  
20      site or the company admit to placing anything on  
21      the site, the answer is that our understanding is  
22      that ashes, cinders, clean fill, similar kinds of

24

Bauer1

1 materials, were disposed of by Scovill  
2 Manufacturing at that location.

3 BY MR. STEWART:

4 Q. Is the -- well, then did you testify in  
5 your deposition that Scovill Manufacturing and  
6 Saltire Industrial took the position that there  
7 wasn't anything, there were no hazardous  
8 constituents in that, in those items disposed?

9 A. I would have to review my testimony to  
10 see what I actually, you know, specific responses  
11 to questions.

12 Q. Well, I understand, my understanding is  
13 you just told me that you for the company,  
14 conceded having placed cinders and what not on  
15 the site?

16 A. Um-hm.

17 Q. And did you, was that, did you concede  
18 having placed those items on the site through  
19 1974?

20 A. The end date is not clearly known.

21 Q. And you didn't set an end date?

22 A. That's correct.

□

25

1 Q. Okay. Is the distinction you're making  
2 that, is your recollection that you for the  
Page 22

Bauer1

3 company have not conceded that what was disposed  
4 on the site contained hazardous materials?

5 A. Yeah. We only know in general terms the  
6 nature of the materials in terms of, you know, no  
7 specific analysis were available as far as we  
8 know relating to the contents or characterization  
9 of those materials.

10 Q. Has the Environmental Protection Agency  
11 ordered Saltire Industrial or Scovill  
12 Manufacturing, Inc. to clean up the Calabrese  
13 site?

14 MR. LUCAS: Mike, let me just -- the  
15 court reporter is having trouble hearing you  
16 because your voice is real low.

17 If you could speak up just a little bit,  
18 I think it will help her.

19 THE COURT REPORTER: I am, yes.

20 MR. STEWART: I'll do what I can. Do  
21 you need her to read back the question?

22 THE WITNESS: I believe I already

26

1 answered.

2 No is the response.

3 BY MR. STEWART:

4 Q. What has the Environmental Protection  
5 Agency, what has the Environmental Protection  
Page 23



Bauer1

6 Agency's involvement been to date with the  
7 Calabrese site litigation?

8 MR. LUCAS: Object to the form of the  
9 question.

10 THE WITNESS: Specifically what kind of,  
11 what are you interested in?

12 BY MR. STEWART:

13 Q. Well, you have told me the EPA was  
14 involved, and I want to know just in your own  
15 words what that involvement has amounted to up to  
16 this point.

17 MR. LUCAS: I'm going to again object to  
18 the form of the question. It's overly-broad.

19 You may answer.

20 BY MR. STEWART:

21 Q. Please.

22 A. Okay. The EPA had sent an information

□

27

1 request.

2 As to whether it was actually to Scovill  
3 or whether it was to Saltire, I don't frankly  
4 remember -- an information request relating to  
5 the site, as well as a general notice letter.

6 Q. And has Saltire Industrial responded to  
7 the information request yet?

8 A. No.

Bauer1

9 Q. When is it going to respond to the  
10 information request by the Environmental  
11 Protection Agency relating to the Calabrese site?

12 A. Responses are due in early March.

13 Q. Have you given me an exhaustive  
14 description of the depositions that you have had  
15 taken in your career?

16 A. Yes.

17 Q. Okay. Have you ever sued anyone, Mr.  
18 Bauer?

19 A. No, sir.

20 Q. Okay. Has anyone ever sued you before  
21 personally?

22 A. No.

28

1 Q. Okay. Has anyone sued Saltire  
2 Industrial, Inc. other than Mr. Calabrese and the  
3 litigation in that case and Scovill, Inc. and --  
4 pardon me -- the plaintiffs in this case?

5 A. Perhaps; I don't know.

6 Q. Do you know of any litigation currently  
7 pending against Saltire Industrial other than the  
8 litigation we're here to talk about today and the  
9 Calabrese litigation you have discussed?

10 A. No. I don't recall any others.

11 Q. Do you recall any litigation against  
Page 25

Bauer1

12 Saltire Industrial or Scovill, Inc. at any time  
13 other than the litigation involving the Calabrese  
14 property and, and the litigation we're here to  
15 talk about today?

16 A. I understand there was allegations of  
17 asbestos exposure due to product manufacturing,  
18 you know, years past.

19 I don't know the status or anything  
20 about those cases that are outside of my realm.

21 I believe there was also a case relating  
22 to the Stringfellow site in California.

□

29

1 Again, the nature, the exact extent of  
2 that case I'm not aware of.

3 There certainly may be others, but I  
4 don't recall at this time.

5 Q. You have told me every item of  
6 litigation that you do recall?

7 A. Yes.

8 Q. Well, then can you tell me what you do  
9 know about, first of all, whether any asbestos  
10 exposure cases are still pending against Saltire  
11 Industrial?

12 A. I'm not, I'm not aware of any, but I --  
13 I don't know is the better answer.

14 Q. Do you know who in the company would  
Page 26

Bauer1

15 know?

16 A. Wayne Smith, Chief Financial Officer  
17 that handled those matters.

18 Q. Does --

19 A. And we were one of the many parties, and  
20 it wasn't the case that it was a big deal.

21 Q. Does Mr. Smith work at Saltire  
22 Industrial today?

□

30

1 A. He is in the New York office.

2 Q. So the answer to my question is yes?

3 A. Mister, Mr. Smith is an officer of  
4 Saltire Industrial.

5 Q. Okay. Tell me about the Stringfellow  
6 site.

7 Is that a CERCLA site?

8 A. Yes.

9 Q. Okay. Is that, has that been remediated  
10 that you know of?

11 A. There has been substantial remedial work  
12 on that site.

13 As a player in that site, Saltire was a  
14 de minimis party, but there have been subsequent  
15 personal injury kind of cases that have been  
16 filed, and all of the potentially responsible  
17 parties associated with the site typically have

Bauer1

18 been named.

19 Q. Do you know how many personal injury  
20 lawsuits Saltire Industrial, Scovill or any of  
21 Scovill's subsidiaries have been named in in  
22 California?

31

1 A. No, I do not.

2 Q. Do you think it's more than one?

3 A. That's the only one that I know of that  
4 I can recall at the moment.

5 Q. A single personal injury lawsuit filed  
6 relating to the Stringfellow site?

7 A. I believe there were actually two.

8 Q. Are these class action lawsuits?

9 A. Whether they were class action or  
10 whether they were simply multi-party suits, I'm  
11 not aware.

12 Q. Are you aware of whether those had been  
13 settled?

14 A. I don't believe those have been settled.

15 Q. Do you know who the attorneys are that  
16 have brought those lawsuits or claims?

17 A. No. I don't recall.

18 Q. Do you know where those cases are being  
19 litigated?

20 A. In California, but I don't know where.  
Page 28

Bauer1

21 Q. How long has the EPA been involved with  
22 the stringfellow site?

32

1 A. Many years; I don't -- you know, it's  
2 one of the early Superfund sites.

3 Q. Are you aware of any, who -- is Mr.  
4 Smith the person in the company who would have  
5 the most detailed knowledge -- and by company, I  
6 mean Saltire Industrial -- most detailed  
7 knowledge about those lawsuits not settled in  
8 California that you just described?

9 MR. LUCAS: I object to the form of the  
10 question.

11 MR. STEWART: I think you're objecting  
12 because I included information -- well, I won't  
13 speculate.

14 MR. LUCAS: If you want me to clarify  
15 the basis, I'll be glad to.

16 MR. STEWART: No. Let me just rephrase  
17 so we're perfectly clear.

18 BY MR. STEWART:

19 Q. Who in the company or related to Saltire  
20 Industrial, Inc. could provide the most  
21 information about the two lawsuits?

22 MR. LUCAS: I'm sorry. I didn't quite

Bauer1

33

1 get that question.

2 would you mind repeating it?

3 MR. STEWART: Not at all.

4 BY MR. STEWART:

5 Q. who in the company, by which I mean  
6 Saltire Industrial, would be able to provide the  
7 most information about those lawsuits in  
8 California?

9 A. Probably myself, but I would simply have  
10 to, you know, refresh my recollection of those  
11 sites.

12 Q. what would you need to refresh your  
13 recollection of those sites? what documents?

14 A. Take a look at the complaints that were,  
15 that were filed.

16 Q. Do you have copies of those complaints  
17 at Saltire Industrial, Inc.'s offices?

18 A. I believe so.

19 Q. Okay. Do you know of any -- first of  
20 all, have you given me an exhaustive list of  
21 every item of litigation that you know of that  
22 Saltire Industrial or Scovill have been involved

Bauer1

34

1 with?

2 A. Yes. Litigation meaning, you know,  
3 court ordered.

4 Q. Right.

5 A. Or type of actions; those are all that I  
6 recall at the moment.

7 Q. Okay. Well, do you recall any purely  
8 administrative disputes or hearings or matters  
9 that Saltire Industrial, Inc. or Scovill was  
10 involved in?

11 A. Relating to environmental matters, or  
12 related to a broader question than that?

13 Q. Well, why don't we say relating to  
14 environmental matters?

15 A. Yes. The company is involved in other  
16 administrative environmental issues.

17 Q. Why don't you tell me which ones the  
18 company is involved in?

19 Before you do that, can we agree that  
20 when we're talking about the company, that we're  
21 talking about Saltire Industrial, Inc., which I  
22 take it is the successor entity to the various

□

35



Bauer1  
1 Scovill Manufacturing entities that you  
2 described?

3 A. That's okay. That was my -- yes.

4 Q. That's what we're talking about when we  
5 say the company, right?

6 A. That's a good clarification.

7 Q. Okay. Now tell me the environmental  
8 administrative issues that the company has been  
9 involved in.

10 A. So you're interested in a list of  
11 issues, sites?

12 Q. That's right.

13 A. Et cetera, that the company has been  
14 involved in, or is that encompassing all time or  
15 sort of more currently active sites or issues or  
16 what's your focus?

17 Q. My focus is everything you know about,  
18 but you might start from --

19 A. How many days do you have?

20 Q. Okay. Well, why don't you start, and  
21 I'll tell you when I'm no longer interested?

22 A. Okay.

0

36

1 MR. LUCAS: When you say why don't you  
2 start, can you kind of narrow the focus of the  
3 question for me?

4 MR. STEWART: Bauer1  
Certainly.

5 BY MR. STEWART:

6 Q. I would just like you to just start  
7 listing for me the administrative I think you  
8 said environmentally-related actions, hearings,  
9 proceedings, that Scovill or that the company has  
10 been involved in.

11           A.   Okay.  And by administrative, I assume  
12       you mean any kind of agency agreements, or is  
13       that --

14 Q. Yes. And let me help clarify. What I'm  
15 interested in from you, Mr. Bauer, is just to  
16 describe for me the, the, the proceedings, so for  
17 a clarification, you could describe the  
18 proceeding we're involved in as working with the  
19 Tennessee and federal regulatory officials to  
20 remediate the Dickson site understanding that  
21 there are hundreds of documents that you have  
22 provided me about that.



37

1 I don't want you to list every document.  
2 I just want you to tell me about each, each  
3 occurrence or site that you're dealing with.

4 Does that clarify that?

5 MR. LUCAS: It doesn't. That's why I'm  
6 going to object to the form.

7                                   Bauer1  
MR. STEWART: Fair enough.

8                                   MR. LUCAS: Do you want to ask him  
9 about, for example, each site?

10                                  MR. STEWART: Yeah, why don't we start  
11 that way?

12                                  I'm just trying to provide a framework  
13 whereby he can describe fairly the company's  
14 environmentally-related administrative actions.

15                                  I don't want him to take me through at  
16 this point Phase 1, Phase 2, and so forth.

17                                  MR. LUCAS: Yeah, that was my concern.  
18 When you said, when you mixed together in your  
19 question you said tell me about each occurrence  
20 or each site.

21                                  Each occurrence, I mean I don't know  
22 what mean by occurrence. That's every time they

□

38

1 write a letter back and forth or what?

2                                  MR. STEWART: Well, given our time  
3 constraints, I'll start with sites.

4                                  MR. LUCAS: That's what I thought.  
5 That's what I thought you wanted, so can we agree  
6 he's going to tell you about sites that are the  
7 subject of administrative actions?

8                                  MR. STEWART: For this question, yes.

9                                  MR. LUCAS: Sure.

10 THE WITNESS: <sup>Bauer1</sup> Okay. There's a -- okay.  
11 Dealing with the Regional Water Quality Control  
12 Board in southern California, remediation and  
13 ongoing monitoring of site in the City of  
14 Industry, California.

15 MR. LUCAS: I'm sorry. City of what?

16 THE WITNESS: City of Industry,  
17 California; working with the Environmental, U.S.  
18 Environmental Protection Agency, remediation and,  
19 remediation of the Caldwell Trucking Superfund  
20 site, Fairfield, New Jersey, U.S. EPA Region 9,  
21 and investigation and remediation of the Puente  
22 Valley Operable Unit -- Puente Valley Operable

□

39

1 Unit of the San Gabriel Valley Superfund site.

2 And for this matter, related to this  
3 matter, working with the U.S. EPA in the State of  
4 Tennessee on investigation, remediation of the  
5 former Schrader Automotive site in Dickson,  
6 Tennessee.

7 BY MR. STEWART:

8 Q. And can we agree for clarification that  
9 when we refer to the site or the facility today,  
10 that we'll be referring to the site you just  
11 described in Dickson, Tennessee?

12 A. Agreed at least except as I may be

13                                   Bauer1  
13       perhaps doing this listing, I may occasionally  
14       refer to the current site that we're talking  
15       about.

16               Q.    Certainly.

17               A.    With the State of Connecticut DEP,  
18       Department of Environmental Protection,  
19       investigation and remediation of facility in  
20       Watertown, Connecticut.

21                   Let's see.  What are the others?  We  
22       were a party with the Stringfellow case as we

□

40

1       mentioned before, Stringfellow Superfund site, so  
2       that was an investigation and remediation again  
3       with the U.S. EPA.

4               Okay.  Other sites also with  
5       environmental, U.S. Environmental Protection  
6       Agency include the solvent recovery services of  
7       New England site, Southington, Connecticut, again  
8       investigation and remediation activities, the old  
9       Southington landfill, also in Southington,  
10      Connecticut, investigation and remediation  
11      activities.

12              Enterprise Recovery Systems, and that's,  
13      I don't recall the location.  What's the location  
14      of that site?  It was also working with U.S. EPA  
15      investigation and remediation activities.

16                   Bauer1  
Can I see the list so far that we have?  
17           Q.   Certainly. This is a handwritten list I  
18   have been making since we started the proceeding.  
19   You're welcome to refer to it.  
20           (The witness reviewed the document.)  
21           MR. STEWART: It's on two pages.  
22           (The witness reviewed the document.)

□

41

1           THE WITNESS: Okay. Another site is the  
2   Arrowhead Plating site, Montrose, Virginia, with,  
3   under the auspices of the U.S. EPA,  
4   investigation, remediation activities.  
5           (The witness reviewed the document.)  
6           THE WITNESS: Those are the sites, the  
7   active sites that I remember at the moment.  
8           I may be leaving out some of the less  
9   significant sites, but those are the ones that I  
10   remember at the moment.  
11          BY MR. STEWART:  
12          Q.   Where could I find a list of those, all  
13   of the sites?  
14                  Does one exist at Saltire Industrial,  
15   Inc?  
16          A.   I don't believe we have a comprehensive  
17   list of all sites.  
18          Q.   You said active sites. Can you tell me

Bauer1  
19 about any inactive sites?

20           A.    There are sites that have been settled  
21           over the years, Stringfellow, for example, being,  
22           you know, one of them, although we still have

0

42

1 other litigation as a result of that site.

2           There was the Auburn Road landfill, PJP  
3   landfill. There are many others.

4 Enterprise Recovery, we already  
5 mentioned that one. That's still ongoing. Saad  
6 site, S-A-A-D, Superfund site.

7 Q. If you went back to your office, what  
8 would you look at to, to develop a comprehensive  
9 list of every inactive site and active site?

10           A.    Have to go back and look at my files.

11 Q. What documents in those files would tell  
12 you, allow you a way to comprehensively establish  
13 all of your inactive and active sites?

14           A. I would have to go back and piece that  
15 together from probably several different sources  
16 to come up with such a list, just going through  
17 and looking, categorizing and going through the  
18 list of each site that I have got, that I have  
19 files on.

20 Q. would you be able to do that, though, if  
21 you went back to your office, actually come up

22           with a complete list of all the active and

43

1 inactive sites that the company has been involved  
2 with environmentally?

3           A.    It may not be entirely comprehensive. I  
4       could put together a more comprehensive list than  
5       I can simply by recollection.

6 Q. Okay. So are you saying it's possible  
7 that, that even with your records at your office,  
8 the list that you would come up with of all the  
9 sites active and inactive might not be totally  
10 comprehensive?

11 A. That's correct.

12 Q. There might be some for which records no  
13 longer exist?

14                   A.     That's correct.

15 Q. Okay. Before we talk about these, have  
16 you settled any litigation involving any of the  
17 sites that you talked about, any of the  
18 administrative sites you just described?

19 By you, I mean the company.

20           A. I don't believe any of those settled.  
21       well, some of those past matters may have  
22       involved litigation.



Bauer1

44

1           The ones I just mentioned do not  
2     involve, you know, settled litigation. I think  
3     actually to go back, correct one thing on the  
4     Caldwell Trucking site, there is litigation with  
5     other potentially responsible parties and their  
6     insurance carriers in terms of other sites where  
7     there is active litigation.

8       Q. Do you know has any litigation been  
9     initiated relating to personal injuries or damage  
10    to neighboring properties relating to any of  
11    those sites?

12       A. I don't recall.

13       Q. Who in the company would be most likely  
14    to recall any litigation relating to any of those  
15    sites by which I mean all of the administrative  
16    sites that you just described?

17           MR. LUCAS: I'm going to object to the  
18    form, object to the lack of foundation.

19           BY MR. STEWART:

20       Q. Answer the question.

21       A. Could you restate the question?

22       Q. Certainly. Do you know of anyone in the

45

Bauer1

1 company other than you who would be more likely  
2 than you to have information about litigation  
3 that would have arisen, if any, about these  
4 sites?

5 MR. LUCAS: Based on that rephrasing, I  
6 will withdraw my objection.

7 THE WITNESS: No, I don't.

8 MR. LUCAS: Do you mind if we take a  
9 short break?

10 MR. STEWART: Let me -- I just have a  
11 few questions on this line, and then I will  
12 break.

13 MR. LUCAS: Okay.

14 BY MR. STEWART:

15 Q. I want to make sure. Am I clear do you  
16 not recall any settlements of any litigation  
17 involving Saltire Industrial, Inc. or the  
18 companies we described other than -- well, I  
19 guess --

20 A. There have been administrative  
21 settlements associated with some of these other  
22 sites.

□

46

1 whether some of these settled matters  
2 may have also involved settlements of litigation,  
Page 41

Bauer1

3 that's what I'm struggling to, you know, to  
4 separate at the moment, and I don't recall  
5 specifically sites where it was a settlement of a  
6 litigated matter.

7 Q. And I want to make sure you understand  
8 that my question did not just involve the  
9 question about any settlements, you know, about,  
10 did not just relate to the specific sites you  
11 mentioned, but any such settlements.

12 MR. LUCAS: By settlement, you mean a  
13 settlement of litigation as opposed to a  
14 agreement, agreement with EPA to do such and such  
15 on a site?

16 MR. STEWART: Let me clarify, I mean a  
17 settlement with a private party, not a  
18 governmental body, relating to any of the sites  
19 you have mentioned.

20 MR. LUCAS: Thank you for the  
21 clarification.

22 THE WITNESS: And again, yes, my answer

□

47

1 is I don't recall there being any, any such  
2 settlements at the moment.

3 BY MR. STEWART:

4 Q. And do you recall any settlements  
5 involving anything else with private parties not  
Page 42

Bauer1

6 specifically related to those sites?

7 A. Relating to litigation, no.

8 Q. How about relating to any claims,  
9 whether litigated or not, involving property  
10 damage or personal injuries?

11 MR. LUCAS: I'm sorry. What's the  
12 question?

13 MR. STEWART: The question is whether he  
14 remembers the company entering into any  
15 settlements regardless of whether litigation was  
16 initiated that stem from accusations of personal  
17 injuries or property damage.

18 MR. LUCAS: And again, you mean  
19 settlements with private individuals --

20 MR. STEWART: Yes.

21 MR. LUCAS: As opposed to administrative  
22 matter with the government?

□

48

1 MR. STEWART: Yes.

2 THE WITNESS: Yeah. No, I don't, I  
3 don't recall any such matters.

4 BY MR. STEWART:

5 Q. Is it possible that Wayne Smith has also  
6 had information or has any information about such  
7 matters?

8 A. while Mr. Smith was dealing with, for  
Page 43

Bauer1

9 example, the asbestos cases, you know, I can't  
10 speculate as to, you know, what he knows and  
11 doesn't, you know, doesn't recall.

12 I would be the one still in the company  
13 probably with the best understanding of the  
14 environmental matters anyway.

15 Q. If you went back to your office, would  
16 your files enable you to know for certain whether  
17 any settlements had been made?

18 A. Not comprehensively; certainly given the  
19 long history of operation of including  
20 predecessor companies, you know, it might shed  
21 some light on, you know, materials that I, I have  
22 dealt with in my term here in the company.

□

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1 Q. Do you think your files would reveal any  
2 settlements of the companies entered in the last  
3 decade from today?

4 A. I would have records on environmental  
5 matters certainly over the last five years.

6 In the preceding five years, I can't  
7 suggest that I would necessarily have them all.

8 MR. STEWART: Okay. This is a good time  
9 for a break.

10 THE VIDEO SPECIALIST: Off record, and  
11 the time on screen is 10:17:28.

Bauer1

12 (A recess was taken.)

13 THE VIDEO SPECIALIST: On record, and  
14 the time on screen is 10:30:48.

15 BY MR. STEWART:

16 Q. Mr. Bauer, has the company ever been  
17 accused of a crime?

18 A. Not to my knowledge.

19 Q. I take it you personally have not?

20 A. No.

21 Q. Has the company ever been assessed civil  
22 fines by an administrative agency?

□

50

1 A. There may have been fines for  
2 environmental, alleged environmental violations.

3 I don't recall any specifics.

4 Q. Do you know who at the company would be  
5 in the best position to know about fines that  
6 have been paid out on, to regulators relating to  
7 environmental claims?

8 A. You know, I probably would be, actually  
9 be in the best position to know, but I just  
10 don't, you know, don't recall there being any.

11 Q. Okay. I want to make sure. So you  
12 don't recall there being any fines over the last  
13 five years?

14 A. That's correct.

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Bauer1

15 Q. Okay. Do you know of documents in your  
16 files that would reveal whether or not the  
17 company has been fined by the Environmental  
18 Protection Agency or a state environmental  
19 authority?

20 A. Yeah. I could review those files to  
21 confirm my recollection.

22 Q. Okay. And would those files also enable

□

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1 you to determine whether such fines had been  
2 assessed prior to five years ago?

3 A. My files are in --

4 MR. LUCAS: I'm going to object to the  
5 form of the question to the extent that it, it  
6 seems to assume or imply that there are fines.

7 I think he has testified that he doesn't  
8 recall any fines.

9 BY MR. STEWART:

10 Q. It's my intention have -- tell me about  
11 your files, five years -- if you looked at your  
12 files relating to periods prior to five years  
13 ago, would they reveal if the company had been  
14 fined for environmental-related activities?

15 A. I would suggest that they are not  
16 comprehensive, that there may have been, you  
17 know, activities that would not be, not be

Bauer1

18 reflected in the files.

19 Q. Can you tell me what would account for  
20 any non-comprehensiveness in your files relating  
21 to environmental matters?

22 A. In particular, former transactions,

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1 sales of former businesses, typically the records  
2 associated with those businesses would go with  
3 the sale.

4 Q. Are any of the environmental sites the,  
5 where administrative activity has been initiated  
6 that you listed, in the State of Tennessee?

7 A. Other than the Dickson property that we  
8 are, we talked about the site -- let's see.

9 Q. I'm not trying to trick you. I'll  
10 mention you have a Saad --

11 A. The Saad site is also in Tennessee.

12 Q. Okay. Can you tell me where the Saad  
13 site is?

14 A. I don't recall the name of the town.

15 Q. Okay. What do you recall about the  
16 administrative action that occurred in that site?

17 A. That actually really predated my  
18 involvement with the company.

19 To my understanding, that was settled  
20 and there was no, you know, no further



Bauer1

21 involvement by the company.

22 Q. Do you know whether or not it involved

□

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1 contaminated land, the Saad site?

2 A. The Saad site, to the best of my  
3 knowledge, there was issue about, you know,  
4 contamination or potential contamination at that  
5 property.

6 Q. Do you know if that involved potential  
7 contamination to groundwater?

8 A. I don't know the details of the Saad  
9 site.

10 Q. Okay.

11 A. You know, that kind of information  
12 presumably would be available through U.S. EPA or  
13 similar kind of sources.

14 Q. Do you know whether ICF Kaiser or IT  
15 Corporation were involved with the Saad site?

16 A. I don't believe so.

17 Q. Okay. Can you tell me which of the  
18 sites that you listed, and I'll hand you the list  
19 if it would help --

20 A. Sure.

21 Q. Are sites about which you have personal  
22 knowledge.

Bauer1

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1 (The witness reviewed the document.)

2 THE WITNESS: I have some degree of  
3 personal knowledge relating to all of those  
4 listed sites.

5 BY MR. STEWART:

6 Q. Okay. Does the City of Industry site  
7 that you mentioned involve contaminated or  
8 accusations of contaminated land?

9 A. Yes.

10 Q. Does it involve a site that was operated  
11 by the company?

12 A. Yes.

13 Q. So I take it that it is not a site where  
14 the company simply was one of many companies  
15 depositing potential waste?

16 A. That's correct.

17 Q. And was, was the Stringfellow site one  
18 in which the company was involved as a company  
19 that deposited waste with a landfill?

20 A. Yes, one of many hundreds of others.

21 Q. Okay. what facility or factory does the  
22 City of Industry, California, matter relate to?

Bauer1

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1 A. The former Ajax Hardware facility.

2 Q. And was that owned by the company?

3 A. Yes.

4 Q. And does, does that environmental action  
5 involve contaminated groundwater?

6 A. Yes.

7 Q. Does it involve volatile organic  
8 compounds?

9 A. Yes.

10 Q. Does it involve trichloroethylene?

11 A. Yes.

12 Q. Does it involve also other contaminants  
13 like heavy metals?

14 A. The groundwater contamination does not  
15 involve heavy metals.

16 There were some metals identified in  
17 soils that had been remediated.

18 Q. Has the company conceded that the Ajax  
19 Hardware facility contaminated the groundwater in  
20 that area that you know of?

21 A. The company is pursuing and it continues  
22 to perform cleanup and monitoring activities at

□

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Bauer1

1 that site.

2 whether there has been any kind of  
3 actual admission of contamination, I don't know.

4 Q. Is any other company performing  
5 remediation or monitoring activities at that  
6 site?

7 A. No.

8 Q. Have any monitoring activities been  
9 conducted off the property on which the Ajax  
10 Hardware facility sat?

11 A. Yes.

12 Q. And have any monitoring wells or soil  
13 samples or soil borings revealed contamination of  
14 off-site property?

15 A. Yes. It's a regional groundwater  
16 problem.

17 Q. So have wells off site revealed that the  
18 aquifer in the area has trichloroethylene in it?

19 A. Yes.

20 Q. Okay. Do you know if the company has  
21 used any environmental specialists or engineers  
22 in that site or with regard to that site?

□

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1 MR. LUCAS: Question -- are you asking  
2 about people as, they have used as consultants on  
3 that site?

4 MR. STEWART: Yeah. Let me clarify.  
5 BY MR. STEWART:  
6 Q. First of all, has any person, employee  
7 of ICF Kaiser Engineers worked at the or with  
8 regard to the Ajax Hardware facility site?  
9 A. No.  
10 Q. Okay. Has any person related to or  
11 employed by IT Corporation worked at that site?  
12 A. No.  
13 Q. Okay. Do you know the name of any  
14 environmental engineers or other environmental  
15 specialists who have been retained by the company  
16 to work on that site?  
17 MR. LUCAS: Hold on. Here is my concern  
18 over that question.  
19 MR. STEWART: Please.  
20 MR. LUCAS: I don't know personally  
21 whether there's potential litigation over that  
22 site or not.

1           If there is, and if there are people who  
2       have been retained as consultants, as you know,  
3       non-testifying consultants --

4           MR. STEWART: I understand your concern.  
5       I think we can agree that, that what I'm entitled  
6       to know and really all I'm interested in knowing

7                                   Bauer1  
8       is the name of the environmental engineering firm  
9       that is operating on that site rather than the  
10      particular potentially non-testifying experts.

11                   MR. LUCAS: If there's an environmental  
12      consulting firm working on that that's publicly  
13      known, then you can disclose that.

14                               Is that fair enough, counsel?

15                   MR. STEWART: It is, although I would  
16      say I think, I believe that the fact that the  
17      experts are non-testifying in another case  
18      probably does not exclude discovery of them in  
19      this case, but I don't really care at this  
20      junction because I don't --

21                   MR. LUCAS: If you don't care, then it's  
22      probably not an issue, but let me tell you my  
23      concern so that I'm not trying to hide a ball

□

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1       from you.

2                   If there were in the future litigation  
3      over that, and if there were people who were  
4      retained as consultants in anticipation of  
5      litigation, then we would not want to disclose  
6      them publicly unless you might have waived it,  
7      and I don't know if that's the case here or not,  
8      but I think, I think that based upon our  
9      agreement and the focus of your question, you can

10 go ahead and answer for publicly known project  
11 engineers.

12 THE WITNESS: So the question, could you  
13 repeat it?

14 BY MR. STEWART:

15 Q. I just want to know if the company's  
16 retained an engineering firm similar to ICF  
17 kaizer if you will to deal with the regional  
18 groundwater problem relating to the Ajax Hardware  
19 facility?

20           A.   Meredith Boli, B-O-L-I, and Associates,  
21           has been the firm assisting the company at the  
22           Ajax site.



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1 Q. And how long has the Environmental  
2 Protection Agency been interested in that site?

3           A.   Actually this is a site that's being,  
4       work is being done under the auspices of the  
5       Regional Water Quality Control Board.

6 It's a state agency.

7 Q. How long have they been involved with or  
8 curious about contamination on the Ajax Hardware  
9 facility?

10 MR. LUCAS: Object to the form of the  
11 question.

12 BY MR. STEWART:

13                   Bauer1  
13           Q.   Well, put it this way. How long, when  
14           was the first time that you know of that the  
15           company met with or wrote to officials of the  
16           California or the Regional Water Quality Control  
17           Board about this site?  
18                   MR. LUCAS: Based on that clarification,  
19           I withdraw the objection.  
20                   THE WITNESS: Mid-1980s.  
21                   BY MR. STEWART:  
22           Q.   Okay. When did the site close or cease

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1           operations?  
2           A.   Similar timeframe.  
3           Q.   Okay. Was that site clean closed?  
4           A.   There were no hazardous waste units on  
5           the site, so there really wasn't an issue of  
6           clean closure or not.  
7           Q.   So no RCRA clean closure documents were  
8           ever filed?  
9           A.   That's right.  
10          Q.   Okay.  
11          A.   There is a, no further action letter  
12          from the Regional Water Quality Control Board  
13          relating to the remedy, remediation that was  
14          done, so while it's not exactly a clean closure,  
15          it's similar.



16 Q. What would the letter, when would that  
17 letter have been dated?

18           A. I don't recall the, I don't recall the  
19       date of that.

20 That would have been late 1980s  
21 probably.

22 Q. When or do you know when concerns were



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1 first raised by anyone that the groundwater near  
2 the Ajax Hardware facility was contaminated?

3           A. I don't believe there was any concern  
4       raised about the Ajax site contamination or  
5       constituents were identified during the process  
6       of closure of the facility.

7           Now the regional, the other half of your  
8       question about, related to the regional problem  
9       and the groundwater, and that, I don't know when  
10      that, that regional problem was identified, but  
11      it was prior to then in the 1970's.

12 Q. When was, do you know when anyone first  
13 attempted to link the problem of regional  
14 contamination of the groundwater to the Ajax  
15 facility?

16           A. Not specifically; I would say that was  
17           some time starting in the 1990s.

18 Q. Okay. Do you know whether or not the

19 first person or entity to raise that concern was  
20 the company?

21 MR. LUCAS: What concern?

22 MR. STEWART: I'll rephrase.

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1 BY MR. STEWART:

2 Q. Do you know whether or not the first  
3 person or entity to raise concerns that the Ajax  
4 hardware facility was a source of contamination  
5 of groundwater was the company?

6 A. No, I don't know.

7 Q. You don't know, or it wasn't?

8 A. I don't know whether, what the mechanism  
9 was, what the initiation was for linking, linking  
10 the two.

11 Q. Do you know if the Regional Water  
12 Quality Control Board or anyone else conducted an  
13 investigation on site at the Ajax Hardware  
14 facility?

15 A. No. We have always worked with the,  
16 with the Regional Water Quality Control Board and  
17 done the worked with the board to design  
18 monitoring remediation work that was done, so we  
19 were following the directions of the Regional  
20 Water Quality Control Board.

21 Q. Do you know what fact came to light in

22 the 1990s that raised concerns that the Ajax

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1 Hardware facility was a source of contamination  
2 of the regional aquifer?

3 A. To try to clarify the earlier response,  
4 it's a matter really of just greater  
5 understanding of the regional problem itself I  
6 would say and the scope of the regional  
7 groundwater, the scope of the regional  
8 groundwater problem.

9 Q. well, what fact about the scope of the  
10 regional groundwater problem raised concerns in  
11 the nineties that the Ajax Hardware facility was  
12 a source of groundwater contamination?

13           A. I don't think I can speculate on to what  
14           the specifics, you know, were because I don't  
15           know.

16 Q. Did you personally have any involvement  
17 with this site, the Ajax Hardware facility, from  
18 1990 to 1995?

19                      A.      No.

20 Q. The remediation of the Caldwell Trucking  
21 Superfund site, did that involve a site that had  
22 been operated by the company?

Bauer1

65

1 A. No.

2 Q. Is that a Superfund site where the  
3 company is alleged to have deposited waste?

4 A. That's correct.

5 Q. Was the company one among many companies  
6 that is involved with that site?

7 A. Yes.

8 Q. Does that site involve contaminated  
9 groundwater?

10 A. Yes, it does.

11 Q. Does that site involve contamination of  
12 groundwater with volatile organic compounds?

13 A. That's correct.

14 Q. And do the volatile organic compounds of  
15 concern at that site include trichloroethylene?

16 A. They do.

17 Q. Okay. Has anyone alleged that the  
18 company is one of the sources of that  
19 trichloroethylene that is in the groundwater?

20 I'll restate.

21 Has it been alleged that the company is  
22 a source of any volatile organic compounds in the

66

Bauer1

1 groundwater near the Fairfield, New Jersey,  
2 Superfund site.

3 A. In terms of because of the waste  
4 disposal at the Caldwell Trucking site?

5 Q. Yes.

6 A. Yes.

7 Q. Is there a particular facility that was  
8 owned by the company that supposedly placed  
9 contaminants in the Caldwell Trucking Superfund  
10 site?

11 A. Yes.

12 Q. Which facility is that?

13 A. General Hose Products.

14 Q. And where is that located?

15 A. It is also in Fairfield, New Jersey.

16 Q. Did the General Hose Products Company  
17 dispose of volatile organic compounds in that  
18 landfill that you know of?

19 A. Not to our knowledge. There -- we don't  
20 believe that the company was a source of volatile  
21 organic compounds.

22 Q. Okay. The EPA Region 9 investigation at

67

1 the Puente Valley Operable Unit, does that  
2 involve a site that was once operated by the  
Page 60

Bauer1

3 company?

4 A. That relates back to the Ajax Hardware  
5 property.

6 Q. Tell me about that relation so I can  
7 understand the relation between the Puente Valley  
8 Operable Unit and the Ajax Hardware facility?

9 A. The Puente Valley --

10 MR. LUCAS: I'm sorry. Would you mind  
11 repeating that question for me?

12 BY MR. STEWART:

13 Q. What is the relationship between the  
14 Puente Valley Operable Unit and the Ajax Hardware  
15 facility?

16 A. The Ajax facility is located in Puente  
17 Valley.

18 It's a, it's just a region in California  
19 that encompasses several towns, including the  
20 City of Industry, so as one of, as being  
21 physically located within this valley in this  
22 area of regional groundwater contamination, it's

□

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1 one of many potentially responsible parties  
2 associated with the Puente Valley site.

3 The Puente Valley, work for the Puente  
4 Valley Operable Unit is being overseen by the  
5 U.S. EPA, and involves regional groundwater

Bauer1

6 monitoring and remediation, whereas the work at  
7 the Ajax site and other site-specific work of  
8 other potentially responsible parties is overseen  
9 by the Regional Water Quality Control Board, the  
10 state agency.

11 Q. Did -- maybe I missed it. What  
12 physically happened at the Puente Valley Operable  
13 Unit with regard to the Ajax Hardware facility?

14 Was waste disposed there?

15 A. The Puente Valley Operable Unit is  
16 simply a regional groundwater contaminated area  
17 with an area of many industries located in the  
18 valley, and commingled groundwater plumes from  
19 many facilities, creating a regional groundwater  
20 problem.

21 Q. Where is the Puente Valley? That is  
22 where is the San Gabriel Valley I guess?

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1 A. It's southern California.

2 Q. Where?

3 A. North of and east of Los Angeles.

4 Q. Okay. Is, is the involvement of the  
5 company in the EPA Region 9 investigation solely  
6 based on occurrences at the Ajax Hardware  
7 facility plant?

8 A. Yes.

Bauer1

9 Q. Okay. Is Meredith Boli & Associates  
10 working independently on the Puente Valley  
11 Operable Unit cleanup?

12 A. No.

13 Q. Are any other engineers working for the  
14 company relating to the Puente Valley Operable  
15 Unit separate and apart from the Ajax Hardware  
16 facility?

17 A. The Camp, Dresser & McKee is the  
18 consulting firm working on the Puente Valley  
19 issue.

20 Q. The State of Connecticut, Watertown,  
21 Connecticut, issue, does that involve a plant or  
22 facility or factory operator owned by the

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1 company?

2 A. Yes.

3 Q. What factory or facility is that?

4 A. It was a, a Scovill facility in  
5 Watertown.

6 Q. What was produced there?

7 A. Buttons, snaps, zippers, all kinds of  
8 products.

9 Q. Was it a metal working factory?

10 A. Primarily.

11 Q. By the way, was the Ajax Hardware  
Page 63



Bauer1

12 facility a metal working factory?

13 A. Primarily.

14 Q. Okay. Does the Watertown, Connecticut,  
15 site involve groundwater contamination?

16 A. Yes.

17 Q. And does it involve contamination of the  
18 groundwater with volatile organic compounds?

19 A. Yes.

20 Q. And among the volatile organic compounds  
21 found in the groundwater, does it involve  
22 trichloroethylene?

□

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1 A. Yes, it does.

2 Q. How long has -- well, is the company  
3 currently involved in groundwater testing or  
4 remediation at that site?

5 A. Involved in ongoing monitoring at the  
6 site.

7 Q. Has the company installed groundwater  
8 monitors off the site?

9 A. No.

10 Q. Has the company conducted any  
11 groundwater monitoring or soil testing or soil  
12 boring off the site?

13 A. No.

14 Q. Okay. Is there any evidence that, well,  
Page 64

Bauer1

15 has trichloroethylene been found in monitoring  
16 wells on site?

17 A. Yes.

18 Q. Okay. Has trichloroethylene or any  
19 other compound of concern been found off site?

20 A. No.

21 Q. How long has the monitoring on this  
22 site, the Connecticut site, been performed?

□

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1 A. I don't recall when that, when that  
2 started.

3 Q. Would it have been before 1990?

4 A. Yes.

5 Q. Okay.

6 A. I expect that site to be, you know,  
7 closed -- not physically closed, but the  
8 environmental issues to be closed shortly.

9 Q. Was that site ever clean closed?

10 A. Again, it was not, there weren't any  
11 RCRA units for clean closure to be applicable.

12 Q. Can you just, so we'll have it clear on  
13 the record, can you tell me what you mean by a  
14 RCRA unit?

15 A. A storage treatment or disposal facility  
16 handling hazardous wastes.

17 Q. And is that, was the contamination on  
Page 65

Bauer1

18 this site a result not of storage of waste but  
19 perhaps leaks or that sort of thing?

20 A. The source of contamination was never  
21 explicitly identified.

22 Q. Is the, but I guess is what you're

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1 saying that there were no RCRA storage units,  
2 there was no landfill or established storage area  
3 for waste on the site?

4 A. That's correct.

5 Q. Okay. So -- but trichloroethylene, was  
6 that used at that facility?

7 A. Yes.

8 Q. Okay. Do you know when facts came to  
9 light that revealed contamination in the  
10 groundwater?

11 A. I don't recall when that, when that  
12 occurred.

13 Q. Would it have been before 1990?

14 A. Yes.

15 Q. Do you have any knowledge as to what  
16 person or entity discovered the facts that  
17 revealed contaminated groundwater?

18 A. The company identified the, those facts  
19 in the course of closure of the, of the facility.

20 Q. At that time, was the company working  
Page 66

Bauer1

21 with the EPA or the state officials?

22 A. State officials.

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1 Q. Okay.

2 A. And back on similar questions relating  
3 to the Ajax Hardware site, all the data related  
4 to the site was data generated by the company  
5 working with, under the direction of the regional  
6 water control, Water Quality Control Board.

7 There wasn't, you know, other  
8 independent investigations by other parties or  
9 the government.

10 Q. When the information at Ajax was  
11 provided to regulators, the Water Quality Control  
12 Board, was the Water Quality Control Board  
13 already, had it already raised concerns about  
14 potential contamination on the site?

15 A. We're doing, as I understand it, doing  
16 routine closure activities and monitoring  
17 associated with closure of the facility, so there  
18 weren't any other more specific concerns raised  
19 prior to that time.

20 There weren't any understanding or were,  
21 there weren't any knowledge or expectation of  
22 finding contamination or contaminants.

Bauer1

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1 Q. And so was the, as part of closure, was  
2 the company trying to monitor groundwater to show  
3 that there wasn't contamination so it could close  
4 the site? Is that --

5 A. Just performing monitoring to fulfill  
6 the requests of the Regional Water Quality  
7 Control Board.

8 Q. I see. And is that what happened in the  
9 Watertown, Connecticut, site, too, basically?

10 A. Yes.

11 Q. Okay. Okay. You mentioned a solvent  
12 Recovery Services of New England site in  
13 Southington, Connecticut.

14 Is that different from the Watertown,  
15 Connecticut, site?

16 A. Yes.

17 Q. Does that involve a factory facility or  
18 plant that was owned or operated by the company?

19 A. No.

20 Q. Is that a Superfund site at which the  
21 company deposited or is alleged to have deposited  
22 waste?

Bauer1

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1 A. Yes.

2 Q. Okay. Is the company one of a number of  
3 companies that were involved?

4 A. Yes.

5 Q. Is the, does that case, does that  
6 matter, the Southington, Connecticut, Solvent  
7 Recovery Services of New England matter involve  
8 poisoned -- I'll restate that -- involve  
9 contaminated groundwater?

10 A. Yes.

11 Q. Does it involve groundwater contaminated  
12 with volatile organic compounds?

13 A. Yes.

14 Q. Does it involve groundwater contaminated  
15 with trichloroethylene?

16 A. Yes.

17 Q. Is it alleged that the company  
18 contributed to the volatile organic compounds and  
19 trichloroethylene in the groundwater?

20 A. It's alleged that the company sent waste  
21 materials to Solvent Recovery Systems for  
22 recycling.

□

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Bauer1

1 Q. Is it alleged that a particular  
2 operation of the company was responsible for  
3 sending those waste materials, a particular  
4 factory?

5 A. I don't recall which facilities were  
6 involved with sending materials or alleged to  
7 have sent materials to that site.

8 Q. Do you know how many facilities Scovill  
9 had or the company I'll say, was operating in  
10 Connecticut at that time?

11 A. No, I do not know.

12 Q. Do you know the timeframe when the waste  
13 was allegedly generated that went into the  
14 Solvent Recovery Services of New England site?

15 A. I don't recall. I would have to review  
16 that material.

17 Q. Was it before 1985?

18 A. Again, I don't recall.

19 Q. Okay. Now is the old Southington  
20 landfill a different site from the Recovery  
21 Services of New England site?

22 A. Yes.

□

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1 Q. Is that a site involving a plant or  
2 facility or operation owned by the company?

3 A. No.

Bauer1

4 Q. Is that a CERCLA site where the company  
5 allegedly deposited waste?

6 A. Indirectly, yes.

7 Q. Okay. Tell me what you mean by  
8 indirectly.

9 A. Waste from the Solvent Recovery site  
10 were disposed of at old Southington landfill.

11 Q. I see. And so is there groundwater  
12 contamination at the old Southington landfill?

13 A. Yes.

14 Q. Is that contamination with volatile  
15 organic compounds?

16 A. Yes.

17 Q. And is that contamination with  
18 trichloroethylene?

19 A. That's a constituent there, yes.

20 Q. Okay. Has the company accepted or  
21 admitted that trichloroethylene from its  
22 operations got into the groundwater at the old

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1 Southington landfill site?

2 A. No. I don't believe we have ever made  
3 such an admission.

4 Q. Had the company ever admitted that any  
5 of its trichloroethylene or other hazardous  
6 materials got into the groundwater at the Solvent



7 Recovery Services of New England site? Bauer1

8           A.    No.  Again, I don't think we have ever  
9    made such an admission.

10                   You know, we're participating at those  
11                   sites, but in terms of legal issues of having  
12                   made such an admission, I don't believe so.

13 Q. Okay. You said you're participating at  
14 the site.

15                   How are you participating at the New  
16           England Solvent Recovery Systems of New England  
17           site?

18           A. As part of a potentially responsible  
19       party group.

20 Q. Do you know how many potentially  
21 responsible parties there are in that group?

22 A. There are many dozens. I don't remember



80

1 the number.

2 Q. Has one firm been retained to work with  
3 the environmental agencies to clean up that site  
4 by this group?

5 A. Yes.

6 Q. Is that ICF Kaiser?

7 A. No.

8 Q. Is it IT?

9 A. No.

10 Q. Do you know who it is? Bauer1  
11 A. The sort of management consultant is  
12 American Environmental Consultants.  
13 Q. Do you know where they're located?  
14 A. No. I don't recall.  
15 Q. Do you know who the project manager,  
16 other person in charge of that site is?  
17 A. Randy Smith.  
18 Q. Okay. Do you know a name of the project  
19 manager involved at the Ajax site?  
20 A. William Hass.  
21 Q. Okay. And the manager at the Watertown,  
22 Connecticut, site, do you know who that is?

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1 A. Mike Lowe.  
2 Q. Okay. Did I ask you -- I don't think  
3 so -- who the -- is ICF Kaiser involved with the  
4 Watertown, Connecticut, site, or have they been?  
5 A. Yes.  
6 Q. Is IT Corporation now responsible for  
7 that site?  
8 A. Yes.  
9 Q. Okay. The Enterprise Recovery Systems  
10 site, where is that?  
11 A. Mississippi.  
12 Q. Does that involve a plant or facility

13                                   Bauer1  
13       that had been operated by the company?  
14           A.    No.  
15           Q.    Is that a CERCLA site where the company  
16       is alleged to have deposited waste?  
17           A.    Yes.  
18           Q.    What facility of the company is alleged  
19       to have participated in depositing waste?  
20           A.    I do not recall which facilities are  
21       involved there.  
22           Q.    Do you know if the company has over time

0

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1       had more than one facility in Mississippi?  
2           A.    No, I do not know.  
3           Q.    Do you know of any facilities in  
4       Mississippi?  
5           A.    No, I don't.  
6           Q.    Okay. Do you know if the Enterprise  
7       Recovery Systems site involves a contaminated  
8       groundwater?  
9           A.    I don't recall. I think, I believe it  
10       does, yes.  
11          Q.    Do you recall whether or not the  
12       groundwater is contaminated with volatile organic  
13       compounds?  
14          A.    We're a minor player at the site, and I  
15       just don't, I don't remember.

16 Q. Okay. Do you know who the engineering  
17 firm that is handling that site remediation is?  
18 A. I don't recall.  
19 Q. Okay. You say you're a minor player.  
20 Is that because of the amount of waste deposited?  
21 A. Yes.  
22 Q. Okay. In the, in the New England site,

83

1 Recovery Services' New England site, is Scovill,  
2 is the company a major player?  
3 A. No.  
4 Q. Is the company a major player at  
5 Southington, Connecticut?  
6 MR. LUCAS: Object to the form of the  
7 question.  
8 MR. STEWART: Okay.  
9 THE WITNESS: We are considered, you  
10 know, very small players in and contributors to  
11 the, to either one of those sites.  
12 BY MR. STEWART:  
13 Q. Either one meaning the --  
14 A. Old Southington or the Solvent Recovery  
15 site.  
16 Q. Okay. Caldwell Trucking, are you a  
17 significant player in your mind?  
18 MR. LUCAS: Object to the form.

19 THE WITNESS: Bauer1 what do you mean by  
20 significant in that case?  
21 BY MR. STEWART:  
22 Q. I was kind of keying off your

84

1 terminology.  
2 I mean is your involvement in that  
3 Caldwell Trucking matter more substantial than in  
4 the New England Solvent Recovery Services?  
5 A. Yes, that's fair to say.  
6 Q. Okay. And who are the, who are the  
7 engineers involved with the remediation of the  
8 Caldwell Trucking Superfund site?  
9 A. By engineers, you mean the sort of  
10 design and construction?  
11 Q. ICF Kaiser equivalent, if that helps  
12 you.  
13 A. Okay. Golder Associates.  
14 Q. And who is the project manager?  
15 A. Grant Hocking.  
16 Q. Okay. Okay. You mentioned an Arrowhead  
17 Plating site in Montrose, Virginia.  
18 Does that involve a facility plant or  
19 operation that was owned or operated by the  
20 company?  
21 A. Yes.

22 Q. Okay. Does that involve a contaminated <sup>Bauer1</sup>

85

1 groundwater?

2 A. Yes.

3 Q. Is the groundwater contaminated with  
4 volatile organic compounds?

5 A. Yes.

6 Q. Is one of the volatile organic compounds  
7 in the groundwater trichloroethylene?

8 A. Yes.

9 Q. Okay. Is -- how long has it been known  
10 that there are volatile organic compounds in  
11 groundwater at that site?

12 A. Closure of that site again occurred in  
13 mid-1980s, and at that time, monitoring, initial  
14 monitoring was conducted, and volatile organic  
15 compounds were identified.

16 Q. Okay. The monitoring was conducted by  
17 the company?

18 A. Yes.

19 Q. Okay. At that time, was this a site  
20 where there were RCRA units?

21 A. I don't recall whether there were RCRA  
22 units at that site or not.

Bauer1

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1           It was, the actual closure of the  
2           facility was prior to my time, and I don't recall  
3           whether there were any RCRA units there.

4           I don't believe so.

5           Q.   Okay.  So was the site clean closed, or  
6           do you recall?

7           A.   No, I don't recall.  I mean I don't  
8           recall.

9           Q.   But closure, was closure being conducted  
10          with environmental authorities?

11          A.   Yes.

12          Q.   And at that time, groundwater testing  
13          was done?

14          A.   That's correct.

15          Q.   And that's when the trichloroethylene  
16          was found?

17          A.   Yes.

18          Q.   And I think that you said this, but and  
19          that's what occurred essentially at the Ajax  
20          Hardware facility?

21          A.   Yes.

22          Q.   And that's what occurred at the

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Bauer1

1 Watertown, Connecticut, facility?

2 A. That's correct.

3 Q. Okay. And now at Arrowhead Plating,  
4 were groundwater monitoring devices, soil samples  
5 or soil borings taken off the site grounds?

6 A. Yes,

7 Q. Okay. Has any contamination with  
8 volatile organic compounds been revealed to exist  
9 off the site grounds?

10 A. Yes.

11 Q. Okay. Can you tell me the nature of the  
12 contamination that you know of that has occurred  
13 at the Arrowhead Plating facility off the site  
14 grounds?

15 A. Nature meaning the type of constituents  
16 or --

17 Q. Well, I would like to know the type of  
18 the constituents and how far off the site they  
19 have traveled.

20 A. The constituents are volatile organic  
21 compounds.

22 Migration is limited by natural surface

□

88

1 features.

2 I don't recall exact distances. It's in  
Page 79



Bauer1

3 the order of a few hundred feet at the most.

4 Q. would there be public records that would  
5 show exactly how many feet, that sort of thing,  
6 and the exact nature of it?

7 A. Yes.

8 Q. By the way, as long as we're talking  
9 about these things, you mentioned a plume when we  
10 were talking earlier.

11 Can you tell me what a plume is just  
12 when you use that term.

13 A. It's probably not a very precise term,  
14 so I'll try to be more precise in the answers.

15 Q. Sure.

16 A. But I would generally describe a plume  
17 as a region of groundwater in which particular  
18 compounds, substances have been detected.

19 Q. Okay. Does a plume mean all the  
20 contaminants in the ground, or just the kind of  
21 the source area?

22 A. I wouldn't describe it as either.

□

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1 Q. Okay.

2 A. You can define a plume at some  
3 particular concentration level, and you know,  
4 there are going, there are going to be molecules  
5 beyond what you draw as a, as a, as a plume, but

Bauer1

6 it is basically a concentration defined area.

7 Q. So if I say, if I were to describe, is  
8 this right, a plume of trichloroethylene at ten  
9 UG/L, then that means this is where we think  
10 trichloroethylene at that level has flowed?

11 Is that what that means?

12 A. Or whether it has flowed or not,  
13 whatever, that's where it has been identified and  
14 it's extrapolated to from a limited number of  
15 data points to be within that area, and if by  
16 UG/L micrograms per liter, is that the -- parts  
17 per billion?

18 Q. Um-hm.

19 A. Sort of concentration level, whatever it  
20 happens to be?

21 Q. Okay. Yeah, and because we'll be  
22 referring to this a lot, parts per billion and

□

90

1 UG/L, we can use those terms interchangeably, is  
2 that correct?

3 A. Micrograms per liter, I mean it's, a U  
4 is actually a mew I think. It's one of those  
5 little, you know, Roman kind of --

6 Q. Right.

7 A. Or Greek letters; that is the symbol for  
8 micro, so it's a microgram per liter.

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Bauer1

9 Q. If I say five UG/L TCE in the  
10 groundwater and you say five PPB in the  
11 groundwater of TCE, are we talking about the same  
12 thing?

13 A. Approximately, yes.

14 Q. Okay. Do you know if that's the maximum  
15 contaminant level of, level for TCE in  
16 groundwater?

17 A. Five micrograms per liter is the maximum  
18 contaminant level for TCE.

19 It has no particular bearing on  
20 groundwater.

21 Q. Oh, okay, but that's the maximum  
22 contaminant level for trichloroethylene?

91

1 A. Yeah. For maximum, right, that's  
2 correct.

3 Q. What does the maximum contaminant level  
4 mean?

5 A. It's a EPA established level that  
6 applies to, applies at the drinking water tap,  
7 and is a level that water purveyors with a  
8 certain, of a certain size are required to have,  
9 to monitor and to ensure that the water provided  
10 to their customers is at or below that level.

11 Q. Okay. And so public water, public water  
Page 82

Bauer1

12 for the City of Washington can't have over five  
13 UG/L of trichloroethylene in it?

14 A. That's correct.

15 Q. Okay. The inactive sites, the Auburn  
16 Road landfill, was that involving a plant or  
17 facility run or owned by the company?

18 A. No.

19 Q. Was that a CERCLA site where the company  
20 was alleged to have deposited materials?

21 A. Again, one of, you know, one of many  
22 potentially responsible parties, generators.

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1 Q. Does that site involve contaminated  
2 groundwater?

3 A. Yes.

4 Q. Does that site involve groundwater  
5 contaminated with volatile organic compounds?

6 A. I don't recall the constituents of  
7 concern there.

8 Q. Okay. How about the PGP landfill?

9 A. Similar question?

10 Q. Yeah. Does that, is that a CERCLA site  
11 where the company is alleged to have contributed  
12 hazardous materials?

13 A. This site at which, yes, the company is  
14 alleged to have arranged for the disposal of

Bauer1

15 wastes there.

16 Q. Is that a site where the company is  
17 alleged to be the primary source of waste?

18 A. No.

19 Q. Okay. Are any of the sites that we have  
20 described so far that have not involved a  
21 company-owned facility, have any of those sites  
22 been sites in which the company is alleged to

93

1 have been the primary source of contamination?

2 A. No.

3 Q. Is the -- where is the Auburn Road  
4 landfill?

5 A. I don't recall. I have to check.

6 Q. Okay. Where is the PGP landfill?

7 A. It's in New Jersey.

8 Q. Where at?

9 A. North Jersey some place; I don't  
10 remember the name of the town.

11 Q. Hopefully my English teacher will never  
12 watch this tape!

13 MR. LUCAS: Can I object to the form of  
14 the dangling preposition?!

15 Do you want me to object every time you  
16 dangle a preposition?

17 MR. STEWART: Please no. It would make  
Page 84

Bauer1

18 the tape impossible to watch!

19 BY MR. STEWART:

20 Q. Is this, the Saad Superfund site, was  
21 the company alleged to have been the primary  
22 source of materials deposited at that site?

0

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1 A. I don't know. Again, I wasn't really  
2 involved in that site.

3 Q. Okay. Do you know whether or not that  
4 site involved contamination of groundwater?

5 A. No, I don't.

6 Q. Okay. Do you know what engineers were  
7 involved with remediating that site?

8 A. No, I do not.

9 Q. Okay. Do you know -- I take it that  
10 site is not a site where the company owned a  
11 plant or operation?

12 A. That's correct.

13 Q. Okay. Do you receive reports on the  
14 Ajax site on a monthly basis?

15 A. No.

16 Q. Do you receive reports on any of the  
17 sites that we have discussed or that you have  
18 listed as having administrative activities  
19 ongoing or past on a monthly basis?

20 A. Yes.

Bauer1

21 Q. What sites do you receive reports on?

22 A. There are reports filed with the

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1 Environmental Protection Agency at the, for the  
2 Arrowhead Plating site and the Dickson site and  
3 the Caldwell Trucking site, all in, on a monthly  
4 basis, and I receive copies of those reports.

5 Q. Okay. How about the Watertown site?

6 A. No.

7 Q. Why are there no reports being filed at  
8 Ajax, well, I don't want to put words in your  
9 mouth.

10 What reporting is going on at the Ajax  
11 Hardware facility?

12 A. Semi-annual groundwater monitoring  
13 report.

14 Q. Okay. And at the Watertown,  
15 Connecticut, facility?

16 A. Monitoring reports, and we are currently  
17 working toward closure of that facility.

18 MR. LUCAS: Excuse me. We have got one  
19 minute left on the tape according to the  
20 videographer.

21 THE WITNESS: Can we take a break?

22 MR. LUCAS: Why don't we go ahead and

Bauer1

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1 take a short break? And we'll resume with a new  
2 tape.

3 THE VIDEO SPECIALIST: Off record, end  
4 of Tape 1, and the time on screen is 11:26:52.

5 (A recess was taken.)

6 THE VIDEO SPECIALIST: On record; this  
7 is Tape 2, and the time on screen is 11:45:36.

8 BY MR. STEWART:

9 Q. Mr. Bauer, back on the record; I have a  
10 few questions about these administrative actions.

11 A. Yes, sir.

12 Q. Do you know if the -- I don't know if we  
13 tried to assign a date to the Ajax Hardware  
14 facility.

15 Do you know when contamination was first  
16 discovered there?

17 A. Again, it was mid, mid-1980s.

18 Q. Do you think it predated say the closure  
19 of the Dickson plant?

20 A. It's similar kind of timeframe. I would  
21 say perhaps. You know, it's similar timeframe.

22 Q. Okay. How about the Watertown,



Bauer1

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1 Connecticut, site? Did that --

2 A. I would have to check on the exact  
3 dates; similar, similar timeframe.

4 Q. Mid-'80s?

5 A. Mid to late '80, yes.

6 Q. That's for Watertown?

7 A. Yeah.

8 Q. Okay. And how about the Arrowhead  
9 Plating, which I notice is now, did you say  
10 it's -- well, no. I won't put words in your  
11 mouth.

12 Do you know the date timeframe for the  
13 discovery of contaminants at Arrowhead Plating?  
14 A. Again, closure there was in a similar  
15 timeframe, mid-1980s.

16 Q. I take it for all three of those sites,  
17 could we look at, you know, I mean would you  
18 assume there would be public, would you assume  
19 there would be company records that would show,  
20 you know, the first time that volatile organic  
21 compounds were discovered in groundwater near  
22 those sites?

□

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Bauer1

1 A. Yes.

2 Q. Okay. Have there been Phase 1 reports  
3 of the sort performed or created for the Dickson  
4 facility created relating to the Arrowhead  
5 Plating facility?

6 A. There have been investigation reports  
7 not titled similarly, but with investigation  
8 results.

9 Q. So I could go to the EPA you think and  
10 find an investigative report that would probably  
11 tell me when the date was that you or that say  
12 trichloroethylene was first discovered in the  
13 groundwater at Arrowhead Plating?

14 A. I would think so.

15 Q. And the same would be true for the  
16 Watertown, Connecticut, site?

17 A. Yes.

18 Q. And the same would be true for the Ajax?

19 A. At Ajax, you would need to go to the  
20 Regional Water Quality Control Board.

21 Q. Okay. And you probably have records of  
22 that sort at your company for all three sites?

□

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1 A. Yes. I have the investigation reports,  
2 and to the extent that they document, you know,  
3 initial findings, I have those.

Bauer1

4 Q. Okay.

5 A. I may not have every report that was  
6 filed certainly for some of these sites.

7 Q. Okay.

8 A. But --

9 Q. Do you recall when trichloroethylene was  
10 first found in groundwater at the Dickson site?

11 A. That would be the first reported  
12 incidence, reports of that were May 1988.

13 Q. Okay. What report are you referring to?

14 A. The compliance -- what do they call it?  
15 The CMI, the compliance management inspection  
16 report that was prepared on behalf of U.S. EPA.

17 Q. I'm going to hand Mr. Bauer first  
18 through his attorney Exhibit 18 from the Brand  
19 deposition, which I believe is the CMI report he  
20 referred to without its appendices.

21 Is this the report you just referred to?

22 (The witness reviewed the document.)

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1 THE WITNESS: Yes. Did I say it's the  
2 compliance inspection and comprehensive  
3 groundwater monitoring evaluation of the site  
4 dated May 24th, 1988, but without, you know,  
5 going through every page, I can't say whether  
6 it's a complete copy or not, but yes, this is the

7 report I was referring to. <sup>Bauer1</sup>

8 BY MR. STEWART:

9 Q. Okay. And does it look complete to you?

10 A. Do you want me to page through it and  
11 like look at each page, or --

12 Q. Do what you need to do. Tell me --  
13 we're on video, so we'll be able to see what you  
14 did, and I don't think we'll hold it against you  
15 if there is a missing page, but I would just like  
16 you to tell me if it looks like a copy of the  
17 complete report but without its appendices.

18 (The witness reviewed the document.)

19 THE WITNESS: All the pages appear to be  
20 here that are referenced in the Table of  
21 Contents, including with the addition of the  
22 references of appendices, as you mentioned, are

101

1 not included here.

2 BY MR. STEWART:

3 Q. Okay. So does it look like the report  
4 itself that you have got in front of you is  
5 complete?

6 A. It appears to have all the pages that  
7 are referenced, yes, except with the exception of  
8 the appendices.

9 Q. I understand. Could you just turn to

10 the Executive Summary? Bauer1

11 A. Um-hm.

12 Q. And the second page of the Executive  
13 Summary, do you see on item 3, the last sentence  
14 says trichloroethylene concentration in the  
15 groundwater downgrading of the sludge drawing  
16 bed, open paren, W-3, comma, 15,000 UG/L, close  
17 paren, is above the MCL limit for groundwater of  
18 five UG/L, comma, which was promulgated on July  
19 8th, 1987?

20 Do you see that?

21 A. Yes.

22 Q. Okay. Is this one of the first findings

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1 of the trichloroethylene in the groundwater at  
2 the Dickson site that you were referring to when  
3 I asked you for the first findings?

4 A. This is the first finding that I'm aware  
5 of of trichloroethylene in the groundwater at the  
6 site.

7 Q. Okay. And that 15,000 UG/L figure, is  
8 that the same measure of trichloroethylene as is,  
9 as for the five UG/L limit that we discussed for  
10 say public drinking water?

11 A. Yes.

12 Q. So just so we understand the relation,

13           the 15,000 UG/L is, is Bauer1 that 3,000 times the limit  
14           for public drinking water we discussed earlier?

15           A.   Fifteen thousand would be 3,000 times  
16   the five micrograms per liter MCL.

17 Q. That's the one promulgated by the  
18 Environmental Protection Agency?

19 A. Yes. It was proposed in July '87, and I  
20 don't believe it was final until 1989.

21 Q. It was final in 1989, okay. Do you, do  
22 you see now in the fifth paragraph, I believe it

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1 is the second from the last sentence where it  
2 says trichloroethylene was identified in the  
3 groundwater at 15,000 UG/L, comma, open paren,  
4 w-11, in the soil at 27,000 UG/KG, open paren,  
5 SW-11A, close paren, in the vicinity of the  
6 former storage tank?

7 A. Yes.

8 Q. Okay. Again, is that the other or one  
9 of the other first findings of trichloroethylene  
10 in the groundwater at the Dickson facility?

11 A. Referring to well W-11, yes, that's the  
12 groundwater.

13 Q. And the other reference to SW-11A,  
14 that's a soil boring, right?

15 A. That's, yes, that's correct.

16                   Q.    So -- and I just wanted to -- actually  
17                                   Bauer1  
18                   I'm not going to take you through this document  
19                                   I just want to make sure when you refer  
20                   to the first findings of trichloroethylene that  
21                   we're talking about those findings in wells 3 and  
22                   wells 11 in 1988.

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1                   A.    Yes.  That's what the document  
2                   indicates.  Those were the two wells that she  
3                   mentioned.

4                   Q.    Did Scovill perform this test for  
5                   trichloroethylene?

6                   A.    No.

7                   Q.    Okay.  Who did?

8                   A.    This report was prepared by Camp,  
9                   Dresser & McKee, prepared for the U.S. EPA.

10                  Q.    And that's the same Camp, Dresser &  
11                  McKee that is the primary contractor working on  
12                  the Puente Valley Operable Unit?

13                  A.    Actually this is CDM Federal Programs  
14                  Corporation, which is a separate entity from  
15                  Camp, Dresser & McKee.

16                        They keep themselves separate for conflict  
17                  of interest reasons.

18                  Q.    I'm sure we could go to lunch just on

Bauer1  
19 questions about that relationship, but I guess  
20 Camp, Dresser & McKee, when they were conducting  
21 the two well tests you just described, were they  
22 working for the Environmental Protection Agency?

0

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1 A. Yes.

2 Q. okay. And did they actually drill well  
3 11?

4           A. I would have to refer to the document to  
5   confirm that.

6 Q. See if you can do it quickly, you know.

7 A. Okay.

8 Q. I, actually I can't lead you there, so  
9 if you think you know where in the document you  
10 can determine that, that would be --

11 (The witness reviewed the document.)

12 BY MR. STEWART:

13 Q. Perhaps it's in Section C. I'm looking  
14 at page 33. That might be useful.

15                      A.      Um-hm.

16 (The witness reviewed the document.)

17 THE WITNESS: Yes. Monitoring well W-11  
18 was one of the wells installed by CDM Federal  
19 Programs.

20 BY MR. STEWART:

21 Q. Okay. Was monitoring well w-3 installed



22 by the company? Bauer1

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1 A. That was a previously existing well  
2 prior to this study that CDM performed.

3 Q. Is that described on page 29, existing  
4 well construction and location?

5 A. Page 30 of the document, yes, the wells  
6 1 through 4 were installed during June 1982.

7 Q. Okay. So well 3 where they found the,  
8 where there was a report of 15,000 UG/L  
9 trichloroethylene was a 1982 well?

10 A. That's correct.

11 Q. Okay. Mr. Bauer, do you know why -- I  
12 believe you testified that at the, at the Ajax  
13 Hardware facility in the Watertown, Connecticut,  
14 facility and the Arrowhead Plating facility, the  
15 company tested for and found trichloroethylene in  
16 the groundwater, but the company did not test for  
17 trichloroethylene in groundwater on the Dickson  
18 site until 1988?

19 A. I think the timeframes were probably  
20 similar at those other facilities, and it was in  
21 those late '80s as companies became more aware of  
22 potential for chlorinated solvents in particular

Bauer1

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1 to migrate and dissolve into groundwater.

2 Q. But do you know why having drilled wells  
3 at the Dickson facility as early as 1982, the  
4 company did not test for trichloroethylene?

5 A. The primary focus at that site -- again,  
6 I was not actually present, as you're certainly  
7 aware, but from reviewing the documents that I  
8 have seen, the primary focus and concern at the  
9 site related to the on-site disposal of the waste  
10 water treatment plant material, the sludge from  
11 the waste water treatment plant, and the on-site  
12 landfill cells, and that waste material was  
13 metals concern.

14 There wasn't any documentation of or  
15 concern related to the use of trichloroethylene  
16 at the facility.

17 Q. What was done, just generally, what was  
18 the operation at the Dickson facility?

19 What were they making?

20 A. They were making tire valves and related  
21 pneumatic kind of gauges and valves.

22 Q. Was, could you characterize the process

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Bauer1

1 as a metal working process?

2 A. Yes.

3 Q. Okay. The trichloroethylene was used to  
4 what?

5 A. To clean the metal parts prior to other  
6 operations.

7 Q. And what was the basic operation of the  
8 Ajax Hardware facility?

9 A. It was also metal working type of  
10 facility.

11 Q. And what was the trichloroethylene used  
12 for?

13 A. Also for cleaning purposes.

14 Q. And what about the Watertown,  
15 Connecticut, facility?

16 What was that facility? Metal working.

17 A. Yes.

18 Q. And what was the trichloroethylene used  
19 for?

20 A. For cleaning purposes.

21 Q. Okay. And how about the Arrowhead  
22 Plating facility?

□

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1 A. For cleaning purposes.

2 Q. And that was a metal working facility?  
Page 98

Bauer1

3 A. Yes. They -- yes.

4 Q. Okay. But just want to make clear, the  
5 first awareness that, that the company had of  
6 trichloroethylene poison -- excuse me -- the  
7 first awareness that the company had of  
8 trichloroethylene in the groundwater at the  
9 Dickson facility came when the EPA did its own  
10 investigation in 1988?

11 A. That's correct.

12 Q. The company had wells since 1982, is  
13 that right?

14 A. Yes.

15 Q. Okay. But it did not test for  
16 trichloroethylene from 1982 until, until March I  
17 guess 1988?

18 MR. LUCAS: Objection. Asked and  
19 answered several times.

20 Answer once more.

21 BY MR. STEWART:

22 Q. He is correct, but go ahead and answer.

110

1 A. Could you restate the question, please?

2 Q. I just want to make sure that the  
3 company did not test for trichloroethylene in the  
4 wells at the Dickson facility from 1982 until the  
5 EPA came to the site in 1988.

Bauer1

6 A. Based on my review of the documents,  
7 that is correct, because trichloroethylene was  
8 not viewed as a potential concern based on the  
9 operations at the site.

10 Q. Okay. Is it fair to conclude that it  
11 was a concern at the Ajax Hardware facility,  
12 trichloroethylene?

13 A. At the, at the time when that site  
14 closure took place, the agencies there were, were  
15 directed to sample for those materials, and --

16 Q. And you did?

17 A. And we did.

18 Q. Okay. And that's true for the -- it was  
19 a concern at the Watertown, Connecticut,  
20 facility?

21 A. Whether it was a concern or not, again,  
22 it was, it was sampled.

□

111

1 Q. Okay. And trichloroethylene was sampled  
2 at the Arrowhead Plating facility?

3 A. Yes, again, similar kind of timeframes,  
4 in the mid-'80s.

5 Q. Okay.

6 A. And again, I can check with particular  
7 dates on the closure of those facilities.

8 Q. I understand. Switch gears here and just  
Page 100

Bauer1

9 ask you about the company.

10 Now Saltire, the official name of the  
11 company is Saltire Industrial, Inc., is that  
12 right?

13 A. Yes. That's correct.

14 Q. Go ahead.

15 A. There is a comma between the Saltire  
16 Industrial and the Inc., as I recall.

17 Q. So it's Saltire Industrial, comma, Inc?

18 A. Um-hm.

19 Q. Okay. Where is that company located?  
20 Where is the headquarters?

21 A. In New York.

22 Q. Where in New York?

□

112

1 A. In New York City.

2 Q. Okay. What's the address, do you know?

3 A. 800 Third Avenue.

4 Q. Okay. And who are the officers of the  
5 company?

6 A. Robert Bertellotti is the managing  
7 director.

8 Q. How do you spell that?

9 A. B-E-R-T-E-L-L-O-T-T-I.

10 Q. Okay. And he is the?

11 A. Managing director.

Bauer1

- 12 Q. okay. All right.
- 13 A. Wayne Smith, senior vice president.
- 14 Q. Okay.
- 15 A. Chief Financial Officer and Chief
- 16 Financial Officer.
- 17 Q. Okay. He is CEO and CFO?
- 18 A. No -- just CFO.
- 19 Q. Chief Financial Officer?
- 20 A. Yes.
- 21 Q. Okay.
- 22 A. And myself, Nicholas Bauer, vice

□

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- 1 president, environmental affairs.
- 2 Q. Who is the president?
- 3 A. We do not have a president.
- 4 Q. Who is the secretary?
- 5 A. I don't believe we actually have a
- 6 corporate secretary as an officer.
- 7 Q. Who is the treasurer?
- 8 A. Not as a corporate officer, so it's --
- 9 Q. Okay. So you have listed for me all the
- 10 people you think are corporate officers?
- 11 A. That's correct.
- 12 Q. Do you know where Saltire Industrial
- 13 Corporation is incorporated?
- 14 A. Delaware.

Bauer1

15 Q. Do you know how many employees Saltire  
16 Industrial has?  
17 A. Yes.  
18 Q. How many?  
19 A. Zero.  
20 Q. Zero employees?  
21 A. Yes.  
22 Q. Are you not an employee of Saltire

□

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1 Industrial?  
2 A. No, I am not an employee of Saltire  
3 Industrial.  
4 Q. Okay. We'll come back to that, but do  
5 you know in what state, if any, Saltire  
6 Industrial files tax, state tax returns?  
7 A. No. I'm not aware.  
8 Q. Would Mr. Smith be the person who would  
9 be responsible for tax returns in that company?  
10 A. He would know, yes.  
11 Q. Okay. Do you know what accounting firm  
12 does Saltire Industrial's audit every year?  
13 A. No, I do not. I'm not sure.  
14 Q. Okay. Do you know the names of any  
15 outside accountants of that firm?  
16 A. No.  
17 Q. Okay. Do you know if Saltire



Bauer1

18 Industrial, do you know what its revenues were  
19 last year?

20 MR. LUCAS: Objection. What's the  
21 relevance of that to anything?

22 And I understand the scope of discovery

□

115

1 and relevance, but I think you're getting into an  
2 area dealing with potential post-judgment  
3 remedies. It's inappropriate for discovery.

4 MR. STEWART: I believe that in our  
5 state, I think you'll agree that our court has  
6 been very precise about defining what is relevant  
7 with regard to insurance information, and we have  
8 had some recent decisions about that.

9 I think you would also agree that I'm  
10 entitled to get a pretty good sense of the nature  
11 of these companies.

12 However, let me just continue  
13 questioning and you can pose your objections and  
14 see how we proceed.

15 MR. LUCAS: To make sure we're on the  
16 same wavelength, I take it from your comments  
17 we're in agreement that insurance information is  
18 not discoverable?

19 MR. STEWART: Other than that that  
20 because of the environmental laws has been

Bauer1

21 disclosed by you in discovery by your clients;  
22 this is an unusual case obviously in which

□

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1 certain insurance information is public as  
2 opposed to a typical case where it's  
3 confidential.

4 MR. LUCAS: And I do agree with you  
5 you're entitled to certain background information  
6 on the companies, and I don't wish to object to  
7 your asking questions on that type of general  
8 information, but you understand where I'm coming  
9 from on the objection.

10 MR. STEWART: Yes.

11 BY MR. STEWART:

12 Q. Mr. Bauer, who are the board members for  
13 Saltire Industrial?

14 A. I don't know.

15 Q. Okay. Who would know?

16 A. I can't say for certain, but I think Mr.  
17 Smith would.

18 Q. Okay. Do you know who owns the stock of  
19 Saltire Industrial?

20 A. No, I do not.

21 Q. Are you, do you know if Saltire  
22 Industrial is a subsidiary of another company?

Bauer1

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1 A. Yes. It's the subsidiary of Alper  
2 Holdings.

3 Q. That's Alper Holdings, Inc?

4 A. Alper Holdings, USA.

5 Q. Okay.

6 A. Like capital U capital S capital A,  
7 comma, Inc.

8 Q. Okay. And do you know if Saltire  
9 Industrial owns any plants in the United States?

10 A. Does not.

11 Q. Do you know if Saltire Industrial makes  
12 sales in the United States?

13 A. Does not.

14 Q. Do you know if Saltire Industrial owns  
15 real estate in the United States?

16 A. The company owns one parcel of land in  
17 Dickson County, Tennessee.

18 Q. That's quite a portfolio. Is that the  
19 only real estate you know that the company owns?

20 A. Yes.

21 Q. Do you know when the last board meeting  
22 of Saltire Industrial was conducted?

Bauer1

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1 A. No, I do not.

2 Q. Okay. Do you know, well, do you know  
3 how much of your time personally you devote to  
4 Saltire Industrial activities?

5 A. Essentially a hundred percent.

6 Q. Okay.

7 A. Maybe, you know.

8 Q. Do you work in the office at 800 Third  
9 Avenue, New York City?

10 A. No, I do not.

11 Q. Where do you work?

12 A. I work in Reston, Virginia.

13 Q. And how many people are in your offices  
14 in Reston?

15 A. Just myself.

16 Q. And do you know how much time Mr. Smith  
17 devotes to Saltire Industrial operations?

18 A. No, I don't.

19 Q. Is it your impression that he is a  
20 full-time employee of Saltire?

21 Well, I guess not. Strike that. Is it  
22 your impression that he devotes most of his time

□

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1                                   Bauer1  
2           to Saltire Industrial, Inc. Activities?  
3           A.    I don't know how his time is divided.  
4           Q.    How often do you meet with Wayne Smith,  
5           if ever?  
6           A.    Approximately once a quarter.  
7           Q.    Okay. How often do you talk to him on  
8           the telephone?  
9           A.    Weekly.  
10          Q.    Okay. Does Mr. Smith receive copies of  
11          your correspondence?  
12          A.    Not routinely.  
13          Q.    Okay. Does Mr. Smith receive copies of  
14          correspondence that you have, if any, with  
15          federal and state agencies?  
16          A.    Not routinely.  
17          Q.    Okay. You say not routinely. Would Mr.  
18          Smith receive say a copy of the final RFI report  
19          whenever it's finalized?  
20          A.    Probably not unless he specifically  
21          requested it.  
22          Q.    Okay. Is there any person that under  
                your current procedures, you would forward a copy

□

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1           of drafts or the final RFI to?  
2           A.    Within our company?  
3           Q.    Anyone.

Bauer1

4 A. No.

5 Q. Okay. So not within or without your  
6 company?

7 A. Outside of counsel, no.

8 Q. Okay. Do you know how much time Mr.  
9 Bertellotti devotes to Saltire Industrial  
10 activities?

11 A. No, I do not.

12 Q. Okay. Do you believe he works, devotes  
13 half his time to the company?

14 A. I couldn't speculate.

15 Q. Okay. How often do you meet with Mr.  
16 Bertellotti?

17 A. Approximately once a quarter.

18 Q. Do you, Mr. Smith and Mr. Bertellotti  
19 get together once a quarter?

20 Do you have quarterly meetings? Is  
21 that --

22 A. Not regularly scheduled, but I provide

121

1 them with an update of the environmental matters  
2 specifically, and that usually works out to be  
3 approximately once a quarter.

4 Q. But the meetings you're referring to are  
5 you, Mr. Smith and Mr. Bertellotti all together?

6 A. Although sometimes it might be just with

Bauer1

7 Mr. Smith.

8 Q. I understand. How often do you speak on  
9 the phone with Mr. Bertellotti do you suppose?

10 A. Perhaps once every couple of weeks.

11 Q. Who are the primary decision-maker with  
12 regard to environmental activities and activities  
13 related to the Dickson site in Saltire  
14 Industrial?

15 MR. LUCAS: Sorry. I couldn't hear what  
16 you were saying.

17 BY MR. STEWART:

18 Q. Who in Saltire Industrial, Mr. Bauer, is  
19 the primary decision-maker that makes decisions  
20 about the Dickson site?

21 A. Routine matters, technical matters,  
22 typically I will make those decisions.

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1 If there's something that I feel needs  
2 to be addressed at a higher level, I will consult  
3 Mr. Smith and Mr. Bertellotti about those kind of  
4 matters, and receive direction from them.

5 Q. Okay. Do you know when -- okay. Do you  
6 know when Saltire Industrial came into being?

7 A. Nineteen ninety-four I believe was the  
8 name change.

9 Q. You call it a name change. Tell me

Bauer1

10 about that.

11 It was a name change from what to what?

12 A. From Scovill, Inc. of Delaware to  
13 Saltire Industrial, Inc.

14 Q. And so that's why we're calling the  
15 company Saltire and Scovill and its predecessors  
16 because am I hearing you right that essentially  
17 the name of Scovill was changed and it became  
18 Saltire Industrial?

19 A. That's correct.

20 Q. Okay. Do you know if, when that  
21 occurred, or do you know if Saltire Industrial,  
22 Inc. has maintained the liabilities relating to

0

123

1 the Dickson plant?

2 A. Certain liabilities relating to the  
3 environmental issues at the Dickson plant I  
4 believe were retained by Saltire Industrial.

5 Q. Okay. Can you tell me what liabilities  
6 would not have been retained and when?

7 A. Yeah. I'm not familiar with the  
8 transactional documents that, you know, would  
9 have specifically outlined, you know, the limits  
10 or the scope of the liabilities assumed or  
11 retained by Saltire.

12 Q. But it's, I just want to make sure is



Bauer1  
13 what you just said that it is, your understanding  
14 is that Saltire did retain the liabilities with  
15 regard to the Dickson plant environmental  
16 matters?

17 MR. LUCAS: Wait. Wait. Repeat -- you  
18 kind of trailed off with the last part.

19 I think I have got an objection to the  
20 form of the question, but I want to make sure.

21 BY MR. STEWART:

22 Q. Okay. I mean I just want to understand

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1 that what you just said is that, that Saltire  
2 Industrial, Inc. has maintained responsibility  
3 for the Scovill, Inc. liabilities with regard to  
4 the Dickson site?

5 MR. LUCAS: I'm going to --

6 MR. STEWART: I would like you to tell  
7 me your objection because I actually want to get  
8 a clear response.

9 MR. LUCAS: I think you changed it, and  
10 I was going to object. I was covering that.  
11 Could you hear me?

12 I was going to object to a lack of  
13 foundation, but I think you have cured it in the  
14 way you phrased it.

15 If you don't mind, just state it again

16           so we have got a clear understanding. Bauer1

17 BY MR. STEWART:

18 Q. I just want to make sure, Mr. Bauer,  
19 what you're testifying to is that, is that  
20 Saltire Industrial, Inc. has retained  
21 responsibility for the Scovill, Inc. liabilities  
22 relating to the Dickson plant?

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1 MR. LUCAS: Do you mind, just to cure my  
2 foundation objection, phrasing that liabilities,  
3 if any, relating to the Scovill plant?

4 BY MR. STEWART:

5 Q. If any.

6 MR. LUCAS: Thank you.

7 THE WITNESS: The company, that is,  
8 saltire Industrial is, is and has been performing  
9 the environmental investigation and remediation  
10 activities at the site under the direction of  
11 U.S. EPA.

12 BY MR. STEWART:

13 Q. And I take it are you telling me that  
14 you don't know of any liabilities that some other  
15 entity has taken on with regard to the  
16 environmental issues relating to the Dickson  
17 site?

18           A.     That's correct.

19                   Q.     Okay.  who do you work for, Mr. Bauer?  
20                   A.     You mean who do I report to?  
21                   Q.     No.  Who are you?  You told me you were  
22                   not an employee of Saltire Industrial, Inc.,

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1                   right?  
2                   A.     Right.  
3                   Q.     Okay.  Well, who are you an employee of?  
4                   A.     I'm actually an employee of Alper  
5                   Holdings, USA, Inc.  
6                   Q.     Okay.  
7                   MR. LUCAS:  Mike, our lunch is here.  I  
8                   don't want to interrupt you if you're right in  
9                   the middle of a thought, but when you get to a  
10                  breaking point, we would like to break for lunch.  
11                  MR. STEWART:  I think it's fine.  I  
12                  think we're here.  
13                  BY MR. STEWART:  
14                  Q.     Okay.  Alper Holdings?  
15                  A.     Yes.  
16                  THE VIDEO SPECIALIST:  Off record, and  
17                  the time on the screen is 12:21:58.  
18                  (Whereupon, at approximately 12:20  
19                  o'clock, p.m., the deposition was recessed, to  
20                  reconvene 1:15 p.m. the same day.)

21                   \*   \*   \*   \*   \*

Bauer1

22

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1

AFTERNOON SESSION

2

(1:23 p.m.)

3

THE VIDEO SPECIALIST: On the record,

4

and the time on screen is 13:23:02.

5

EXAMINATION BY COUNSEL FOR THE

6

PLAINTIFFS (Resumed)

7

BY MR. STEWART:

8

Q. Mr. Bauer, we're back on record. Before

9

we talk about Alper Holdings, Inc., I wanted to

10

ask you just do you know whether Saltire

11

Industrial, Inc. has any subsidiaries?

12

A. I don't believe that it has any

13

subsidiaries.

14

Q. Okay. who would be the person that, in

15

the company with the best knowledge of that, do

16

you know?

17

A. Mr. Smith probably could answer that

18

question definitively.

19

Q. Okay. what is it that Saltire

20

Industrial does?

21

A. Saltire Industrial had a subsidiary, a

22

ink, water based primarily, well, packaging inc

Bauer1

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1 manufacturing company called Alper Ink Group, and  
2 that was its primarily subsidiary and operations.

3 That group was sold last year, so you  
4 know, currently Saltire is a company in  
5 transition.

6 Q. Does it have then liabilities other than  
7 the Dickson liabilities you have discussed?

8 A. Yes.

9 Q. What are those? Are they relevant to  
10 this litigation?

11 MR. LUCAS: Objection to the form.

12 THE WITNESS: I don't know whether they  
13 are.

14 BY MR. STEWART:

15 Q. Okay. I asked you, and you're  
16 answering. I didn't mean to interfere.

17 What other liabilities does it have?

18 A. The company has other environmental  
19 liabilities.

20 Their company also has pension and death  
21 benefit liabilities.

22 Q. Any others that you know of?

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Bauer1

1 A. No.

2 Q. Does Saltire Industrial, Inc. have all  
3 of the liabilities, if any, relating to those  
4 administrative clean-up actions you have  
5 described for me today?

6 A. I mean to the extent, relative to --

7 Q. To the extent activities by Scovill,  
8 Inc. and its related entities created  
9 environmental liabilities for those sites that  
10 you listed earlier today, when I asked you about  
11 administrative sites, are those liabilities  
12 currently embraced by Saltire Industrial, Inc?

13 A. Yes.

14 Q. Okay. And do you know of any, if any of  
15 those liabilities for the Dickson or sore any  
16 other site were ever assumed by any other company  
17 in part?

18 MR. LUCAS: Object to the form of the  
19 question, and the foundation.

20 BY MR. STEWART:

21 Q. Okay. Let me rephrase. Well, you know,  
22 to the extent any liabilities exist relating to

130

1 those environmental matters, including Dickson,  
2 do you know of any other company that has ever  
Page 117

Bauer1

3 assumed responsibility for any of those  
4 liabilities?

5 A. Well, for example, at the Dickson  
6 facility, to the extent that environmental issues  
7 might arise from releases or activities  
8 subsequent to the sale of the property to the  
9 current owner, the current owner would be  
10 responsible for responding and addressing those  
11 conditions.

12 So there may be some, you know,  
13 exceptions along those lines.

14 Q. But for Scovill's activities and the  
15 Schrader division's activities, those liabilities  
16 lie with Saltire Industrial, Inc?

17 A. For the sites that we're talking about.

18 Q. Including Dickson?

19 A. Yes.

20 Q. Okay. The purchaser of the plant in  
21 Dickson, is that Tennco, Inc?

22 A. Tennsco, yes.

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1 Q. Tennsco; and did they, do you know  
2 whether they have liabilities, do you know  
3 whether as part of buying the plant, they assumed  
4 liabilities for contamination that existed at the  
5 time they purchased the plant?

Bauer1

6 A. I'm not familiar with the details of  
7 those transactional documents.

8 My understanding personally is, my  
9 personal understanding of the situation is that  
10 for the situation at the time of the, at the  
11 sale, that they did not take on any liabilities  
12 for conditions at the time of the sale.

13 Q. So were you, in discussing Tennsco's  
14 potential liability, were you referring to or  
15 thinking of a scenario where Tennsco could  
16 itself, through its own operations might create  
17 environmental liabilities?

18 A. Yes. Correct.

19 Q. Okay. And your point was that obviously  
20 they would be liable for their own actions?

21 A. Yes.

22 Q. Okay. Alper Holdings, you work for

□

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1 them, is that right?

2 A. That's correct. I'm an employee of  
3 Alper Holdings USA, Inc.

4 Q. Do you know where that company is  
5 incorporated?

6 A. I do not recall.

7 Q. Is that company a subsidiary of another  
8 company?



Bauer1

9 A. No.

10 Q. That you know of -- okay. Is there an  
11 Alper Holdings that is not USA?

12 A. No.

13 Q. Okay.

14 A. Well, I'm not aware of any.

15 Q. Is Alper Holdings USA, Inc. a publicly  
16 traded company?

17 A. No.

18 Q. Do you know whether Alper Holdings USA,  
19 Inc. is owned by a single stockholder?

20 A. I'm not aware. I don't know the  
21 identity or the, anything about the stockholder  
22 or holders of the company.

0

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1 Q. Okay. Do you know who the president of  
2 Alper Holdings, Inc. is?

3 A. There isn't a, anybody of that title.

4 Q. Okay. Well, who is the top dog at Alper  
5 Holdings in your mind?

6 A. The.

7 MR. LUCAS: I'm trying to visualize the  
8 top dog in his mind.

9 MR. STEWART: Going back to the English  
10 teacher.

11 THE WITNESS: The managing director for  
Page 120

Bauer1

12 Alper Holdings is also Mr. Bertellotti.

13 BY MR. STEWART:

14 Q. Okay. Who are the other officers?

15 A. Mr. Smith.

16 Q. Um-hm. What is he?

17 A. He's the senior vice president, Chief  
18 Financial Officer.

19 Q. Okay.

20 A. And myself, Nicholas Bauer.

21 Q. And you are?

22 A. Vice president, environmental affairs.

□

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1 Q. Where is Alper Holdings USA  
2 headquartered?

3 A. Also in New York City.

4 Q. Same address?

5 A. Same address, yes.

6 Q. And does Alper Holdings USA, Inc. have  
7 any employees?

8 A. Yes.

9 Q. Who are they?

10 A. In addition to -- you want the names of  
11 the individual employees?

12 Q. Well, why don't you tell me how many  
13 there are first?

14 A. Nine.

Bauer1

15 Q. Okay. Are they all in the New York  
16 office?

17 A. No.

18 Q. Do any of them work on environmental  
19 matters?

20 A. Not specifically, no.

21 Q. Do any of them work for you?

22 A. No.

0

135

1 Q. Do any of them work in your office?

2 A. No.

3 Q. Okay. Where are the locations of the  
4 employees that don't work in New York?

5 A. Other than myself, there are two  
6 employees that work at an office in Connecticut.

7 I don't know the location of that  
8 office. I have never been there.

9 Q. Is that related to environmental  
10 activities in Connecticut?

11 A. No.

12 Q. Okay. Does Alper Holdings hold any  
13 subsidiaries other than Scovill or Saltire  
14 Industrial, Inc. that you know of?

15 A. I'm not, I'm not certain of the answer  
16 to that question.

17 I manage the environmental issues for,  
Page 122

Bauer1

18 you know, related to the work at Saltire, and you  
19 know, the corporate structure of Alper, I'm not  
20 certain of.

21 Q. Do you know the names of any board  
22 members of Alper?

0

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1 A. No, I do not.

2 Q. Do you know the name of any stockholder  
3 in Alper?

4 A. No, I do not.

5 Q. I take it you're not one?

6 A. No. That's correct. I'm not a  
7 stockholder.

8 Q. Does Alper Industries, Inc. have any  
9 relationship that you know of in terms of  
10 ownership with IT Corporation?

11 MR. PERRY: Mike, you'll need to speak  
12 up.

13 BY MR. STEWART:

14 Q. Certainly. Do you know if Alper  
15 Holdings, Inc. has any relationship in terms of  
16 stock ownership or other type ownership with IT  
17 Corporation?

18 A. I don't believe so.

19 Q. Do you know whether it has any, had any  
20 relationship with ICF Kaiser, Inc?

Bauer1

21 A. I don't believe so.

22 Q. Do you know if Saltire Industrial, Inc.

0

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1 has an ownership relationship with either IT or  
2 ICF Kaiser?

3 A. No. No, sir.

4 Q. Okay.

5 MR. LUCAS: Excuse me one minute. When  
6 you asked earlier -- you just asked if they had a  
7 relationship, and I assume you meant in that  
8 question ownership relationship?

9 MR. STEWART: Yes.

10 BY MR. STEWART:

11 Q. When I say relationship with regard to  
12 the engineering firms IT and ICF Kaiser, I'm just  
13 trying to make sure that your understanding is  
14 that there is no relationship other than one of  
15 company and contractor between those companies.

16 A. Between Alper Holdings USA and IT and  
17 ICF Kaiser, yes, that's correct.

18 Q. Okay. And the same is true for Saltire  
19 Industrial, Inc?

20 A. Yes.

21 Q. Okay. Well, does Alper Holding operate  
22 any plants in the United States?

Bauer1

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1 A. No, sir.

2 Q. Does it operate any plants anywhere?

3 A. No.

4 Q. Does it own real property?

5 A. I don't believe so.

6 Q. Does it sell anything?

7 A. No.

8 Q. Do you know if it doesn't sell anything,  
9 how it pays your salary?

10 A. The company does have or either between  
11 Alper Holdings and Saltire, you know, Saltire I  
12 believe has some assets.

13 Q. What are they?

14 A. I'm -- not, I don't know.

15 Q. Okay. Who would know?

16 A. Mr. Smith deals obviously as the Chief  
17 Financial Officer with the financial matters of  
18 the company.

19 Q. Has Saltire Industrial, Inc. that you  
20 know of ever been unable to conduct any  
21 environmental work requested by a state or  
22 government agency because it was financially

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1 unable to do so?

2 A. Not to my knowledge, no.

3 Q. Have you ever been constrained in your  
4 oversight of environmental activities because of  
5 financial constraints of the company?

6 A. Like any company, there are limited  
7 resources, and so that's an issue that is, you  
8 know, considered in decision-making processes, so  
9 it's, it's, you know, it's a consideration  
10 certainly.

11 Q. Do you have a budget annually?

12 A. Meaning a figure that I'm not supposed  
13 to exceed for --

14 Q. Yes?

15 A. That year -- not specifically, no.

16 Q. Do you make targets of your expenditures  
17 for a given year?

18 A. I make projections of my expenditures.

19 Q. Do those projections include payments to  
20 engineering firms conducting work for your  
21 company?

22 A. Yes.

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1 Q. So like payments to ICF Kaiser or I'll  
2 say -- strike that -- payments to IT Corporation  
3 for activities on the Dickson site would be made,  
4 approved by you in part of your projections?

5 A. Correct.

6 Q. Okay?

7 A. Yes, sir.

8 Q. What are your projected expenditures for  
9 environmental services for -- strike that.

10 what have you projected for your  
11 expenditures for environmental compliance matters  
12 this year?

13 MR. LUCAS: Wait. Can you tie that into  
14 relevancy of something in this lawsuit so that we  
15 don't tread on forbidden ground?

16 MR. STEWART: Yes. I understand -- I  
17 mean the relevancy is two-fold.

18 First, it goes obviously -- well, I'll  
19 ask about the Dickson site where relevancy is  
20 obvious.

21 I think it's important for this lawsuit  
22 for us to understand the extent of Saltire

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1 Industrial's ongoing environmental compliance,  
2 and I'll tell you I don't intend to follow up  
3 with this question on the whole series of



4 asset-based questions, but merely if I can get a  
5 number here, I think that will solve my problem.

6 MR. LUCAS: Give me a break then to talk  
7 with him about that.

8 MR. STEWART: That's fine.

9 MR. LUCAS: And then we'll be right back

10 THE VIDEO SPECIALIST: Off record, and  
11 the time on screen is 13:39:48.

12 (A recess was taken.)

13 THE VIDEO SPECIALIST: On record, and  
14 the time on screen is 13:48:08.

15 MR. LUCAS: I think we resolved my  
16 concern based on what I understood your question  
17 to be, and let me try to say it to make sure I do  
18 understand.

19 Your question is does he have a  
20 projection for what it would cost for the coming  
21 year for investigation or for possible  
22 investigation and remediation at this site?



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1 MR. STEWART: Mine was for all sites.  
2 MR. LUCAS: I thought you had limited to  
3 this site.  
4 MR. STEWART: Well, that was my next  
5 question.  
6 MR. LUCAS: Can we limit it to this site

1 since this is the subject of the litigation?  
2  
3 MR. STEWART: Yes. I tell you, yes.  
4 That's fine.  
5  
6 THE WITNESS: So I'm sorry -- one more  
7 time.  
8  
9 BY MR. STEWART:  
10 Q. For Dickson?  
11 A.. The question?  
12 Q. For the Dickson site, what is your  
13 projection for remediation costs, investigation  
14 costs?  
15 A. For the coming year?  
16 Q. Yes.  
17 A. I am not -- I don't recall specifically.  
18 It's on the order of a few hundred thousand  
19 dollars, say approximately \$500,000.  
20



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1 Q. Okay. What were your actual costs last  
2 year on that site?

3 A. I would have to go back and look. I  
4 really don't know.

5 Q. Would they have been over a hundred  
6 thousand dollars?

7 A. Yes.

8 Q. Would they be in this same range of your  
9 projected costs? I'm not holding you --

**TAB 8**

LEXSEE



Positive

As of: Jun 10, 2008

**UNITED STATES OF AMERICA, Plaintiff, v. HELEN KRAMER, et al., Defendant. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, v. ALMO ANTI-POLLUTION SERVICES CORP., et al., Defendants.**

**Civil Action No. 89-4340 (JBS), Civil Action No. 89-4380 (JBS)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

**19 F. Supp. 2d 273; 1998 U.S. Dist. LEXIS 14183; 47 ERC (BNA) 1645; 29 ELR 20294**

**September 3, 1998, Decided  
September 3, 1998, Original Filed**

**SUBSEQUENT HISTORY:** As Corrected September 21, 1998.

**DISPOSITION:** [\*\*1] Federal Consent Decree, the State Consent Decree, and the State Natural Resource Damages Consent Decree, approved and entered.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiffs United States and the New Jersey Department of Environmental Protection (the governments) filed a hazardous waste action, pursuant to CERCLA, [42 U.S.C.S. § 9601 et seq.](#), and the New Jersey Spill Compensation and Control Act, [N.J. Stat. Ann. § 58:10-23.11 et seq.](#), against defendants landfill and numerous companies. The governments requested approval of federal and state consent decrees resolving all direct claims against defendants.

**OVERVIEW:** In connection with remedying conditions at a superfund site, plaintiffs United States and the State of New Jersey Department of Environmental Protection (the governments), filed motions for entry of federal and state consent decrees resolving all direct claims against defendants landfill and numerous companies arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), [42 U.S.C.S. § 9601, et seq.](#), and the New Jersey Spill Compensation and Control Act, [N.J. Stat. Ann. § 58:10-23.11, et seq.](#),

(the Spill Act). The proposed decrees were published and no comments were received. While the decrees were under consideration, one third-party defendant company objected, arguing that more discovery was needed before the court could undertake CERCLA's fairness determination. The court, after considering the statutory requirements and the overwhelming evidence that sufficient discovery and negotiations occurred between the parties, held that the procedural and substantive requirements of CERCLA and the Spill Act were satisfied by the circumstances, and that the consent decrees were reasonable for all parties involved, including nonsettlers.

**OUTCOME:** The court approved and entered the proposed federal consent decree, state consent decree, and state natural resource damages consent decree.

**CORE TERMS:** settlement, consent decrees, site, settlement process, settling, protocol, settling parties, environmental, landfill, equitable, decree, non-settlor, negotiation, natural resource, reasonableness, remedial, discovery, liaison, hazardous, allocated, proposed settlements, bargaining, assigned, wetlands, global, de minimis, responsible parties, remediation, negotiated, paying

**LexisNexis(R) Headnotes**

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***Civil Procedure > Judgments > Entry of Judgments > Consent Decrees***

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN1]A court should approve entry of a consent decree when it is satisfied that the decree is fair, reasonable, and consistent with the Constitution and the mandate of law. The standard to be applied is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objective of the governing statute.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN2]A court's task is not to make a finding of fact as to whether the settlement figure is exactly proportionate to the share of the liability approximately attributed to the settling parties; rather, it is to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolution.

***Civil Procedure > Judgments > Entry of Judgments > Consent Decrees***

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

***Environmental Law > Litigation & Administrative Proceedings > Consent Decrees***

[HN3]The policy favoring settlement, articulated in CERCLA, is especially strong where a consent decree has been negotiated by the Department of Justice on behalf of the EPA. The quality of the negotiators on behalf of the settlement process participants is likewise notable where a crew of sophisticated players, with sharply conflicting interests, sit at the table representing so may affected parties, themselves knowledgeable.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN4]Disclosure and judicial analysis of the individual participants' shares is irrelevant where the proposed global settlement is not colored by individual party characteristics, such as inability to pay or severability of harm of particular settlers.

***Civil Procedure > Judgments > Entry of Judgments > Consent Decrees***

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

***Environmental Law > Litigation & Administrative Proceedings > Consent Decrees***

[HN5]Settling parties need not include in the consent decrees their individual monetary settlement shares, their bases of settlement allocation, or their individual proportions of site liability as determined by the settlement process among potentially responsible parties. It is sufficient that the terms, rationales, and bases of the consent decrees have been disclosed on a groupwide basis including all settling parties, from which the court may determine whether the group's proposed settlement is fair, reasonable, and faithful to CERCLA.

***Civil Procedure > Judgments > Entry of Judgments > Consent Decrees***

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

***Torts > Negligence > Defenses > Comparative Negligence > General Overview***

[HN6]Substantive fairness goes to the fairness of the result, and requires that the settlement terms are based upon and roughly correlated with some acceptable measure of comparative fault. This requires the government to demonstrate a plausible explanation for measuring comparative fault and allocating liability in the amount set forth in the consent decree. Substantive fairness includes the concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > General Overview***

***Environmental Law > Litigation & Administrative Proceedings > Consent Decrees***

[HN7]Where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice, a presumption of validity attaches to that agreement.

***Civil Procedure > Judgments > Entry of Judgments > Consent Decrees***

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

***Environmental Law > Litigation & Administrative Proceedings > Consent Decrees***

[HN8]The court is also required to consider whether the consent decrees are fair to nonsettlers.

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***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN9]CERCLA imposes joint and several liability for all response costs only upon direct defendants in § 107(a) claims.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Elements***

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Contribution Actions > Settlements***

***Torts > Negligence > Defenses > Comparative Negligence > Multiple Parties > Contribution***

[HN10]All nonsettlers will occupy the position of a contribution defendant upon the claims for contribution brought on behalf of the offerors group of settling defendants, pursuant to § 113(f)(1) of CERCLA. The liability of contribution defendants under § 113(f) may be several, but it may not be joint. As a contribution defendant, a non-settlor's liability must first be proved by the contribution plaintiffs, and, if liable, then a suitable allocation of the non-settlor's share must be determined taking into account such equitable factors as the court deems appropriate under CERCLA § 113(f)(1), applying federal common law including the factors reasonably calculated to assess the non-settlor's proportionate fault. It has also been determined that contribution defendants which are found liable may be called upon to bear an equitable share of the "orphan share" of past and future remedial and response costs in this case.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN11]Section 113(g)(2) of CERCLA permits the United States to commence a subsequent action against new defendants until three years following the completion of all response action at the site.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN12]A district court's reasonableness inquiry, like that of fairness, is a pragmatic one, not requiring precise calculation. To ascertain reasonableness, the court must make an independent determination of the technical adequacy of the work to be performed in cleansing and protecting the environment, whether the compensation to the public for response costs is satisfactory, and the risks and delays inherent in continuing the litigation.

***Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > General Overview***

[HN13]Allegations that the United States' costs were unreasonable and excessive did not provide a defense to cost recovery.

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**JUDGES:** JEROME B. SIMANDLE, U. S. District Judge.

**OPINION BY:** JEROME B. SIMANDLE

**OPINION**

[\*276] **MEMORANDUM OPINION**

SIMANDLE, District Judge:

In connection with the remedying of conditions at the Helen Kramer Landfill Superfund Site in Mantua Township, New Jersey, the United States, on behalf of the U.S. Environmental Protection Agency and the State of New Jersey Department of Environmental Protection, have filed the present motions for entry of federal and state consent decrees resolving all direct claims of the governments in these multi-party hazardous waste cases arising under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), [42 U.S.C. § 9601, et seq.](#), the New Jersey Spill Compensation and Control Act, [N.J.S.A. 58:10-23.11, et seq.](#), (the "Spill Act"), and other state statutes. The proposed [\*\*25] decrees were published for public comment in May, 1998, and no comments were received.

Under the proposed federal Consent Decree, the "Settling Defendants" (comprised of all viable direct defendants and most third-party defendants, numbering nearly 250 parties) will collectively pay the sum of \$ 95 million plus interest to the United States over five years, in reimbursement of past response costs with respect to the Site. A subset of these parties, called the Settling Work Defendants,<sup>1</sup> will perform studies needed by EPA to perform its five-year reviews.

1 The "Settling Work Defendants" are: Rohm & Haas Company, E.I. duPont de Nemours & Co., Elf-Atochem North America, Inc., Cytec Industries (on behalf of American Cyanamid Co.), Mobil Research and Development Corp., Chemical Leaman Tank Lines, Continental Can, and Carpenter Technology, Inc.

Under two parallel Consent Decrees with the State of New Jersey (the "State Consent Decree") the Settling Defendants will pay \$ 9.77 million to the State plus interest accrued [\*\*26] on the unpaid balance, reimbursing the State's past response costs at the site. The Settling Defendants will be obligated to continue operation and maintenance of the Site and to pay the cost of future response actions through May 12, 2023. The State NRD Consent Decree also requires the Settling Defendants to purchase and conserve a 151-acre parcel of wetlands and wooded uplands and to pay the State an additional \$ 190,000 in compensation for natural resource damages. The federal Consent Decree also resolves natural resource damages claims on behalf of the federal natural resource trustees (the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration) by incorporating the Settling Defendants' obligations to

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comply with the State Natural Resource Damages Consent Decree.

#### I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The Helen Kramer Landfill in Mantua Township, New Jersey, was declared a federal [\*277] Superfund site and placed upon the national priorities list by the U.S. Environmental Protection Agency pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), [42 U.S.C. § 9601, et seq.](#) The United States undertook [\*\*27] the Remedial Investigation and Feasibility Study, the Remedial Design, and remedy construction, which was largely completed in 1994. These remedial costs, together with enforcement costs and prejudgment interest to January, 1998, have amounted to approximately \$ 123 million. The United States commenced suit in 1989 to recover all response and remedial costs under Section 107(a) of CERCLA, [42 U.S.C. § 9607\(a\)](#), and the government had by 1997 filed a Third Amended Complaint against the Direct Defendants alleged to be generators and transporters of hazardous substances deposited at the Landfill. After extensive litigation and settlement efforts, the United States and Direct Defendants reached agreement upon a proposed Consent Decree to resolve the United States' claims against all viable Direct Defendants and a wide majority of the Third-Party Defendants. The Consent Decree was lodged with the Court on May 8, 1998, was served upon all parties in the case including non-settlers, and was published for public comment on June 1, 1998, see [63 Fed. Reg. 29,754-55](#), consistent with Department of Justice regulations at [28 C.F.R. § 50.7](#). The United States received no comments.

Similarly, [\*\*28] the State DEP commenced suit in 1989 and reached substantial agreement with a subgroup of the Settling Defendants to enable operation and maintenance functions at the Site to be transferred to these settling parties in 1997. The Site had been turned over to the NJDEP for oversight and maintenance on May 11, 1994. The State decrees were lodged with the court in May, 1998, circulated to all parties, and published through newspapers of general circulation seeking comment. The State received no comments. The Settling Defendants are responsible for all future response costs and all operation and maintenance endeavors subject to a comprehensive compliance schedule through May, 2023, when it is anticipated the remediation will be complete.

One party has objected to these proposed Consent Decrees, namely, third-party defendants Sun Company, Inc. (R & M) and Sun Ship, Inc. [hereafter "Sun"], which filed "tentative opposition" arguing that the court needs more information before it can undertake the fairness determination required by CERCLA, and inviting the

court to protect Sun and other non-settlers by holding that the governments are limited to recovering the proportionate share of liability [\*\*29] from any non-settling defendants and that third-party plaintiffs cannot seek to recover more than their fair share in the remaining contribution action. (Tentative Opp. Br. at 7-11.) In its objection filed seven days before the August 7, 1998 hearing date upon these motions, Sun seeks discovery of information underlying the settlement among the Settling Defendants, including the quantities of material and its nature and toxicity, that each settling party was assumed, for purposes of settlement, to have sent to the Site, as well as the settlement share to be paid by each settling party.

The Settling Work Defendants, also known as the "Offerors Group," strenuously oppose Sun's request, arguing that the settlement process leading to the allocation among Settling Defendants was robust and fair to all participants, including Sun, which assertedly had full access to the settlement process information which it now seeks.<sup>2</sup> The United States and State of New Jersey likewise assert that Sun has raised no meritorious objection, because details as to each party's settlement share are unnecessary to the assessment of the fairness of the overall settlement, and because Sun's potential liability [\*\*30] to the United States is irrelevant and moot.<sup>3</sup>

2 See Affidavit of William H. Hyatt, Jr. (hereafter "Hyatt Aff.") Aug. 5, 1998, at P 10.

3 The United States has also argued that Sun's objection is untimely, since Sun made no comment when the settlement was lodged in May and waited instead until the eve of the hearing in August, citing [United States v. Charles George Trucking, Co.](#), 823 F.2d 685, 690-91 (1st Cir. 1987) (rejecting defendants' defenses to a penalty action for failure to comply with a CERCLA § 104(e) information request, holding parties waived their right to object when they ignored available avenue for redress). This argument does not fit the present case, since the motions for court approval of the consent decrees were filed upon notice to all parties, and the objection was timely under that motion practice.

#### [\*278] II. The Settlement Process

To understand the proposed settlements, we start with the processes that led to them. When the contours of the federal and state cases became apparent, [\*\*31] and after early dispositive motion practice directed at numerous affirmative defenses, [United States v. Kramer](#), 757 F. Supp. 397 (D.N.J. 1991), the parties expressed an interest in seeking to resolve the case. Because the construction of the EPA's remedy was ongoing through 1993, the total costs were unknown. The numerous potentially responsi-

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ble parties ("PRP's") were aligned into Liaison Groups, <sup>4</sup> and representatives of these groups went about drafting a plan for a serious, far-reaching process of data gathering, analysis, and negotiation. This plan was stated in the Settlement Process Protocol, which creates the procedural vehicle for these settlement efforts among the PRP's. Because the ambitious efforts required by the Settlement Process Protocol would require dedication of great resources of time and money, the court agreed to temporarily stay the litigation. The Protocol was adopted by the Settlement Process Participants and was approved by the court, and the liaison counsel were elected to coordinate the process. <sup>5</sup>

4 The Liaison Groups consisted of the Direct Defendants, the Third-Party Plaintiffs, the Third-Party Generators, the Third-Party Transporters and the Third-Party Municipalities. These groups were aligned for case management purposes, and each group selected its liaison counsel. Although over 300 parties were eventually joined in the case (of which 29 were direct defendants and the remainder were third-party defendants), the case could be managed for discovery and other pretrial purposes through the five liaison counsel and the attorneys for the United States and the State of New Jersey.

[\*\*32]

5 The United States and State of New Jersey were not participants in the Settlement Process Protocol. Instead, they were kept informed during frequent periodic conference of all liaison counsel with the court.

The purpose of this process was to reach a fair and reasonable allocation of potential liability among some 300 potentially responsible parties in an ADR process which would create a reliable data base and apply reasonable assumptions regarding the comparative impact of each party's waste stream to the Helen Kramer Landfill. Pursuant to the requisites of the Protocol, all participants were required to respond to a detailed common questionnaire, <sup>6</sup> and responses were audited by the Settlement Process Committee and by the selected Waste Accountant, which was a large accounting firm. (Hyatt Aff. P 5.) When an adequate data base had been achieved, after many months of efforts, the participants selected Clean Sites, Inc., an environmental litigation support firm specializing in dispute resolution, to serve as the Allocation Consultant. (Hyatt Aff. P 6).

6 The certified questionnaire answers were placed into a common repository, available for review by all participants. The data underwent a seemingly endless process of matching, verification, elimination of double-counting, and cross-

checking against other related participants' reported data. This internal cross-checking was designed to elicit honest and complete information upon which to base an allocation.

[\*\*33] Pursuant to the Protocol, Clean Sites prepared an allocation plan, which was to be a non-binding "suggested method by which the costs of any such settlement [with the United States and the State] could be divided among the Participants." (Settlement Process Protocol, P III.D.1.) Clean Sites considered criteria suggested by the participants as equitable factors relevant to the relative fault or culpability of the participants. (Hyatt Aff. P 7) Clean Sites then articulated those criteria and applied them, attempting to replicate the result which would have occurred in an allocation of responsibility by the court after trial under CERCLA Section 113(f), [42 U.S.C. § 9613\(f\)](#). (Hyatt Aff. P 7.) Clean Sites issued a draft allocation report which was subject to advocacy and cross-fire within the settlement process, as one additional step toward a reliable and fair allocation. The final allocation was the "Clean Sites Report."

Under the Protocol, at least two-thirds of weighted voting power was required for the acceptance of the Report as a basis for further negotiations, but the vote fell just short. (Hyatt Aff. P 9.) When no alternative allocation [\*279] plan emerged, the court concluded that [\*\*34] sufficient time had been consumed in the allocation process without coming to an approved final plan, and the stay of litigation was lifted, including discovery and motion practice related to the recoverable costs and the liability of direct defendants.

The participants then decided to continue to use the Clean Sites Report as a basis for further negotiations among themselves, subject to the court's supervision by United States Magistrate Judge Joel B. Rosen, who served as Settlement Judge from 1996 to date. <sup>7</sup> The participants selected co-mediators <sup>8</sup> and, pursuant to Section IV of the Protocol, "entered into negotiations to allocate among themselves the cost to settle some or all of the claims associated in the [Federal and State cases]." (Hyatt Aff. P 9.)

7 The use of a magistrate judge as a settlement judge in a CERCLA non-jury case serves to insulate the trial judge from direct settlement negotiations. Federal Judicial Center, *Manual for Complex Litigation, Third*, § 33.73 at 373 (1995).

8 The co-mediators are Linda Singer and Michael Lewis, of Washington, D.C., who worked with the Settlement Process Participants and with counsel for the United States to forge the individual settlements.



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[\*\*35] Meanwhile, negotiations toward a global settlement had gone forward between the United States and State of New Jersey and the representatives of various groups of PRP's. Court-supervised discussions attempted to develop a framework for compromise of the parties' positions in 1994 regarding the overall settlement demands.<sup>9</sup> The State reached agreement-in-principle with a group of participants who would take over the operation and maintenance functions at the site in 1997, to be followed upon approval of the Consent Decree by payment of a sum of money which reduces somewhat the State's past costs and guarantees payment of future remedial and administrative costs. The United States reached tentative accord with the Offerors Group, which is the core group of defendants bearing the transaction costs of settlement and the risk of under-recovery.

9 Although the global settlement discussions attempted to narrow the range of debate regarding dollars and terms, such a consensus did not develop in 1994 due to many uncertainties. See Case Management Order ("CMO") No. 11 (filed Oct. 17, 1994). These included whether the Settlement Protocol Process could reach a successful conclusion; whether all the costs incurred by the United States and State of New Jersey were recoverable; whether sufficient proof of nexus to the Landfill could be established; whether the remedy selected by the EPA was procedurally and substantively consistent with CERCLA; the contours of release and reopener rights; and other uncertainties coloring the various claims and defenses. My duties as a Settlement Judge, which had begun as Magistrate Judge assisting the late Chief Judge John F. Gerry and which continued as a District Judge through 1995, came to an end, since it was necessary to reopen plenary discovery, dispositive motion practice, and trial preparation upon the claims of the United States. Various case management orders memorialized progress of plenary discovery on the United States' claims of liability against the direct defendants, as well as the issues of remedy selection and response costs. See, e.g., CMO No. 12 (filed Feb. 6, 1995), CMO No. 14 (filed Mar. 27, 1995), CMO No. 15 (filed May 9, 1995), and CMO No. 16 (filed July 31, 1995), while the Clean Sites allocation process continued through 1996, see Supp. CMO No. 18 (filed Jan. 31, 1996). The various ongoing settlement initiatives and opportunities were described in CMO No. 18 ([Second Amdt.](#)) (filed Mar. 19, 1996), including the Settlement Protocol Process, the Global Settlement with State of New Jersey, Private Settlement Initiative among PRP's, EPA DeMinimis Process, and Global Settlement

with United States, and my role as litigation judge was restated. *Id.* At the request of the settlement process participants, I appointed Magistrate Judge Rosen to perform additional duties as Settlement Judge, enumerated in CMO No. 19 (filed Nov. 14, 1996) and amendments thereto in 1997, while I continued to adjudicate the dispositive matters which arose on the litigation track.

[\*\*36] According to counsel for the United States, "The Offerors Group offered to settle with the United States, based both on prior and anticipated settlements with other parties and on their willingness to pursue non-settlers in contribution litigation." Mem. of United States at 7.

The Clean Sites Report served as the basis for further negotiations between the Offerors Group and other Settlement Process Participants, resulting in a negotiated allocation among the Offerors Group and about 240 other participants.<sup>10</sup> This overall group became [\*280] the Settling Defendants listed in Appendix A to the Consent Decree, all of which have submitted signature pages now attached to the original Consent Decree.

10 A significant settlement was also achieved between the Offerors Group and a non-participant in the settlement process, namely, G & S Company, Inc., which was approved by the court after a hearing on July 31, 1998. The G & S settlement is instructive of the manner in which the allocation process functioned. As outlined in the papers supporting approval of the Offerors/G & S settlement, and as restated in the Memorandum of the United States in Support of its Motion for Entry of the Consent Decree at 7-9, the share for G & S was determined as follows.

G & S and its principal, Thomas Gola, were not part of the allocation process under the Settlement Process Protocol and were not assigned shares in the Clean Sites Report. G & S was a broker arranging for disposal of the City of Philadelphia's wastes at the Kramer Landfill, as to which there was good evidence about nexus, quantity and quality. The City of Philadelphia's self-disclosures resulted in an allocated share for the City of 9.92% (reflecting a 33% discount due to its status as a municipality). As a broker, G & S was assigned a half-share (4.96%), since G & S, not the City, dealt with the Kramers and devised the entire disposal scheme for an enormous amount of wastes. In addition, G & S was assigned the entirety of the municipal discount given to Philadelphia (restoring another 4.96%), and it was given a premium as a non-participant in the initial global settlement amounting to 50%.

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The premium was justified because G & S was not accounted for in the Clean Sites allocation, adding uncertainty to a major component of liability, and because G & S should bear some additional responsibility for the substantial "orphan share" in this case, *see United States v. Kramer*, 953 F. Supp. 592 (D.N.J. 1997), and because G & S allegedly made at least \$ 4 million as a result of its brokering and hauling between the City and the Kramer Landfill. Mem. of United States at 8-9 & n.8.

When these percentages were applied to the costs of settling the claims of the United States and the State, the total G & S settlement amount was calculated as \$ 17,707,200.

[\*\*37] In addition to these proposed Consent Decrees with the federal and state governments, the United States anticipates concluding negotiations in the future for an amendment to this decree to provide for *de minimis* treatment of approximately 150 of the Settling Defendants. The main effect of such a settlement would be to remove the "re-opener" conditions on the United States' covenant not to sue with respect to such *de minimis* parties, pursuant to CERCLA § 122(g), 42 U.S.C. § 9722(g). Until such negotiations are concluded, such a *de minimis* component is not presently before this court.<sup>11</sup>

<sup>11</sup> For procedures used in considering judicial approval of *de minimis* consent decree under CERCLA § 122(g), see the late Chief Judge Gerry's opinion approving the proposed settlement of *de minimis* parties' liability at the Lipari Landfill Superfund Site, *United States v. Rohm & Haas Co.*, 721 F. Supp. 666 (D.N.J. 1989).

### III. STANDARDS FOR APPROVAL

#### A. Scope of Review

The United States and the [\*\*38] State of New Jersey seek judicial approval of the respective Consent Decrees they have negotiated with the Settling Defendants. [HN1] A court should approve entry of a consent decree when it is satisfied that the decree is fair, reasonable, and consistent with the Constitution and the mandate of law. *United States v. Rohm and Haas Company*, 721 F. Supp. at 680; *United States v. Acton Corp.*, 733 F. Supp. 869, 871 (D.N.J. 1990). The standard to be applied "is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objective of the governing statute." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 118 (2d Cir. 1992); *United States v. Akzo Coatings*, 949 F.2d 1409,

1424-26 (6th Cir. 1991); *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994); *United States v. Hercules, Inc.*, 961 F.2d 796, 800 (8th Cir. 1992). Congress anticipated that the federal courts would apply standards with broad generality to determine whether the proposed decrees are both fair and [\*\*39] faithful to the statute, taking into account the interests of the public at large, the settling parties and the non-settlers alike. H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3042.

The First Circuit noted the adaptability of this review standard to the different circumstances arising in CERCLA matters:

The concepts' amorphous quality is no accident or quirk of fate. We believe that Congress intended, first, that the judiciary take a broad view of proposed settlements, [\*281] leaving highly technical issues and relatively petty inequities to the discourse between parties; and second, that the district courts treat each case on its own merits, recognizing the wide range of potential problems and possible solutions. When a court considers approval of a consent decree in a CERCLA case, there can be no easy-to-apply check list of relevant factors.

*Cannons*, 899 F.2d at 85-86.

Contrary to the view expressed by Sun as the objecting party, the court does not have the duty to reconstruct the settlement process and review the allocated shares with mathematical exactitude by delving into the data and reports [\*\*40] upon which the settling parties based their negotiations. This approach was rejected by this court in *United States v. Rohm and Haas*, 721 F. Supp. at 680-81, where Judge Gerry wrote:

[HN2][The Court's task] is not to make a finding of fact as to whether the settlement figure is exactly proportionate to the share of the liability approximately attributed to the settling parties; rather, it is to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolution.

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Deference to the parties' judgments regarding these settlements is appropriate in this case. [HN3]The policy favoring settlement, articulated in CERCLA, is especially strong where a consent decree has been negotiated by the Department of Justice on behalf of the EPA. United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990); Akzo Coatings, 949 F.2d at 1436; Charles George Trucking, 34 F.3d at 1085. The quality of the negotiators on behalf of the settlement process participants is likewise [\*\*41] notable where, as here, "a crew of sophisticated players, with sharply conflicting interests, sit at the table" representing "so many affected parties, themselves knowledgeable." Cannons, 899 F.2d at 84. Applying these principles, we will consider Sun's objection and examine the overall fairness, reasonableness, and fidelity to law on a detailed basis momentarily.

#### B. Sun's Objection

In addition to considering the overall fairness, reasonableness, and fidelity of the Consent Decrees, the court must consider Sun's specific objection. Sun argues that the decrees are unfair to non-settlers due to the so-called "secretive nature of the settlements" and the failure of the allocation report to adopt the evidence and inferences therefrom that had been urged by Sun in the settlement process. (Tentative Opp. of Sun Third-Party Defendants, at 4-5.) Sun questions the premises of the allocation report as applied to its waste stream, *id.*, which it believes did not go to the Helen Kramer Landfill at all, as stated by Sun's counsel at oral argument.

First, the court finds that the nature of the settlements was not "secretive." Sun, as a settlement process participant, had all the rights [\*\*42] under the Settlement Process Protocol to inspect and review the underlying data from all participants, whether within or outside its suspected waste stream, and to receive and propose corrections to the Waste Accountant's Report and to the Draft and Final Allocation Reports. There is no dispute that the data and the premises applied to these were articulated to all participants by the allocator (Clean Sites). Sun received this information and analysis, and presumably it received feedback to its proposed revisions and redactions, too, all as called for in the Settlement Process Protocol. If one holds this process up against the template of pretrial discovery and adjudication at a non-jury trial, one finds a greater amount of disclosure, testing of the evidence, and repeated opportunity to correct errors of the allocator/adjudicator in the Settlement Protocol Process.

Sun's objection then boils down to its belief that the allocated share assigned to it through the process was too high, because Sun does not credit the underlying factual findings and presumptions. It is the nature of the allocation process that reasonable parties may disagree about the facts and assumptions underlying [\*\*43] the assigned shares, especially where the Kramer Landfill records included no waste-in lists and many records [\*\*282] were lost or destroyed. Although Sun is the only party to object to the allocation process, one suspects many settling parties also may believe they are being asked to pay too much, given other plausible views of their potential liability.<sup>12</sup> It suffices to find that the process took all known facts into account, including Sun's proposed facts, weighed them, entertained Sun's objections, and gave Sun a plausible explanation for its proposed settlement allocation, all as revealed in Sun's own submissions. [Tentative Opp. of Sun, at 4-5 & Ex. 2 (Third-Party Plaintiffs' Supp. and Amended Interrogatory Responses, 7/10/98)]. Sun disagrees and exercises its right to refrain from settlement on the proposed terms. This is not prejudicial nor is it unfair to Sun.

12 In this sense, if most settling parties nonetheless believe they are paying more than their fair shares, Kramerland is a bit like Garrison Keillor's Lake Wobegon, "where all the children are above average."

[\*\*44] If Sun is correct that it is not liable for any hazardous wastes discharged at the Helen Kramer Landfill, it will be entitled to judgment in its favor, either by summary judgment or after trial.<sup>13</sup> Moreover, even assuming Sun is correct that the allocators erred in determining Sun's share, such a circumstance does not mean that the overall settlement should be rejected by this court. It is the nature of a multi-party hazardous waste settlement allocation that the process seeks to predict the eventual interplay at trial of complicated facts and relationships based on incomplete or ambiguous data and other uncertainties. Not surprisingly, even reasonable predictions can be "wrong." To say this is not to indict the predictive process; rather, it is to place Sun's objection into perspective. As the only party voicing such an objection, Sun has not persuaded this court that the process was substantially flawed in its determinations.<sup>14</sup>

13 This court will not preview any summary judgment motion practice by commenting further upon the information, such as deposition testimony, that Sun proffers in support of its objection to the settlement. To accept Sun's invitation would be to subject this motion to the exacting standards of summary judgment or trial far beyond the proper scope of review, *supra*, and in a manner antithetical to the conservation of judicial

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and litigant resources that a CERCLA settlement is assigned to foster. United States v. Rohm and Haas, 721 F. Supp. at 684.

[\*\*45]

14 Sun also objects that the settlement is unfair to non-settlers because it exposes Sun and others to liability for too great a share of the unrecovered costs. The court will examine this issue below within the context of overall substantive fairness in Part III.C.1, below.

Finally, Sun objects to the form of the Consent Decrees because they do not contain the suballocation amounts for each Settling Defendant. The Consent Decrees instead contain the overall undertakings of the group of settling parties, including payments totaling \$ 95 million plus interest in the United States Consent Decree, and \$ 9.77 million and O & M expenses in the State Consent Decree, and \$ 190,000 and other undertakings to conserve wetlands in the State Natural Resource Damages Decree. Neither the United States nor the State negotiated the shares of individual settlers. Instead, both plaintiffs engaged in the well-recognized (and practically imperative) practice of negotiating an overall settlement with a representative group of PRP's. Groupwide negotiation, through liaison representatives, is nothing new,<sup>15</sup> as other [\*\*46] courts have recognized. See United States v. Charles George Trucking, 34 F.3d at 1081 (explicitly approving process resulting in consent decree which "did no more than assign payment responsibility to classes of [PRPs], leaving the question of allocation *inter sese* to the class members themselves"); United States v. Acton Corp., 733 F. Supp. at 873 (finding EPA's practice of negotiating with a representative group of PRPs, then having them resolve specific allocation shares among themselves, to be practical and reasonable); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 517 (W.D. Mich. 1989) (entering consent decree and declining to order hearing and further discovery even though there was no actual allocation determination); In re Energy Coop., Inc., 173 B.R. 363, 368 (N.D. Ill. 1994) ("requiring such precision as to the total extent of the harm caused and the role of each potentially responsible party is unwarranted.... [\*\*283] We find no conceivable reason why we should require the environmental settlement agreement to delineate suballocation...."); United States v. Mid-State Disposal, Inc., 131 F.R.D. 573, 577 (W. D. Wis. 1990) ("It is not within this Court's [\*\*47] purview to closely scrutinize the allocation of liability among the potentially responsible parties. The Court's core concern must be whether the proposed consent decree furthers the interest of CERCLA, and one of these interests is to encourage settlement to promote the speedy resolution of harmful environmental concerns."); United States v. GenCorp, Inc., 935 F. Supp. 928, 934-35 (N.D. Ohio 1996) (approving settlement which did not

disclose for each party the settlement amount, the proportion of liability and the rationale).

15 See Federal Judicial Center, *Manual for Complex Litigation, Third*, P 33.73 at 373-381 (1995).

A case cited by Sun, United States v. Montrose Chem. Corp., 50 F.3d 741 (9th Cir. 1995), although reversing approval of a CERCLA settlement whose overall basis was not in the record below, did not speak to the issue of whether the court should require disclosure and evaluation of the individual participants' shares and the basis for them. In *Montrose*, the Ninth Circuit found [\*\*48] that the district court had no information from which to conclude that the overall \$ 45.7 million settlement figure was reasonable. The district court had failed to compare "the proportional relationship between the \$ 45.7 million to be paid by the settling defendants and the government's current estimate of total damages...in light of the degree of liability attributable to the settling defendants." *Id.* at 747, citing Charles George Trucking, 34 F.3d at 1087.<sup>16</sup> The *Montrose* court's citation to *Charles George Trucking* emphasizes the fact that *Montrose* was not critical of the district court's lack of analysis of individual settlement shares of the participants, for the *Charles George Trucking* Court said that the individual shares don't matter, because:

After all, the ultimate measure of accountability in any environmental case is the extent of the overall recovery, not the amount of money paid by any individual defendant.

Charles George Trucking, 34 F.3d at 1086.

16 This Opinion addresses precisely this issue in determining the reasonableness of the consent decrees in Part III.C.2, below.

[\*\*49] [HN4]

Disclosure and judicial analysis of the individual participants' shares is irrelevant in this case, where the proposed global settlement is not colored by individual party characteristics, such as inability to pay or severability of harm of particular settlers. The United States and State of New Jersey have seen fit to entertain and accept the group-wide offer. That the individual party shares are in fact already in place within the group, and that each share is derived from the common data, analysis, and negotiation in the Settlement Protocol Process are not in dispute. Further, to require disclosure and judicial examination of each party's proposed settlement share would be to compel the performance of an endless judi-



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cial task of micro-adjudication of the reasonableness of each of 250 parties' allocated settlement shares.<sup>17</sup> This examination could tend toward causing the precise delay and expenditure of judicial resources that the entry of a CERCLA consent decree is meant to avoid.

17 The Clean Sites Report was available to Magistrate Judge Rosen, who used it in the settlement process, and he has retained the copy.

[\*\*50] For these reasons, this court holds that the [HN5]settling parties need not include in the Consent Decrees their individual monetary settlement shares, their bases of settlement allocation, or their individual proportions of site liability as determined by the settlement process among PRPs. It is sufficient that the terms, rationales, and bases of the Consent Decrees have been disclosed on a groupwide basis including all settling parties, from which the court may determine whether the group's proposed settlement is fair, reasonable, and faithful to CERCLA.

### C. Analysis of the Consent Decrees

#### 1. Procedural and Substantive Fairness

Assessing fairness of a CERCLA consent decree requires addressing both procedural and substantive fairness. Procedural fairness considers the openness, candor, and bargaining balance of the settlement process. [\*284] Cannons, 899 F.2d at 86. The procedural fairness analysis looks at the quality of "informed, arm's length bargaining." United States v. Rohm and Haas, 721 F. Supp. at 681, quoting City of New York v. Exxon Corp., 697 F. Supp. 677, 692 (S.D.N.Y. 1988).

As outlined above, the court holds that the Settlement Protocol Process, which led [\*\*51] to the Clean Sites Report and negotiations through the professional mediation team under supervision of the Magistrate Judge, was procedurally fair. Settlement process participants, working with the court, designed and drafted the protocol, which defined the procedures and the participants' obligations and rights. A large majority of the PRPs opted in to the process and selected group liaison counsel to coordinate it. Pursuant to the Settlement Process Protocol, a national accounting firm supervised collection and compilation of data gathered through extensive questionnaire responses and document production. Parties' obligations to one another were enforced through the group liaison counsel, functioning as the Settlement Process Committee. The data were open to inspection and verification by all participants, to assure accuracy and completeness. Two rounds of corrections to this enormous<sup>18</sup> data base were conducted by the Waste Accountant to eliminate mistakes such as double-counting of wastes, underreporting, or misidentification of genera-

tors or haulers. This court oversaw the administration of the Settlement Process Protocol through frequent conference calls and occasional hearings [\*\*52] as the reliable data base was constructed over a two-year period, during which the settlement process participants' litigation burdens were stayed.

18 The Settlement Process Committee reported to the court in 1994 that the computer generated "data dump" reflecting the corrected inputted information in the waste accountant's format was a printout standing four feet high.

Every participant had access to the court to register complaints if it appeared that the settlement process was conducted unfairly or otherwise in a manner inconsistent with the Settlement Process Protocol. Also, disputes as to the adequacy of responses were subject to resolution by a Special Master selected by the participants pursuant to the Protocol. Importantly, the process was entirely non-binding and a participant was free to opt out as if it had never participated, subject only to paying its share of the settlement process fees incurred before its withdrawal.

The assembly of the reliable data base was a necessary but not a sufficient [\*\*53] step toward completion of the process. Those data, as refined and set forth in the Waste Accountant's Report, were furnished to all participants and eventually to Clean Sites, Inc., which under the Protocol heard the participants' views upon the various equitable allocation factors to be applied. Clean Sites made adjustments for types of wastes and converted the various reported volumes (e.g., tank loads, truck loads, barrels, tons, gallons) to a common currency, and began the allocation process by applying the developed allocation factors and assumptions. Again, the participants, whose interests throughout the process were generally adverse to each other, were afforded opportunities to present advocacy with respect not only to their own allocated shares, but also with respect to the shares allocated to other participants. This arm's length check-and-balance through informed advocacy by knowledgeable counsel was a feature that also assured procedural fairness. There is no dispute that Clean Sites, "after considering the equitable factors suggested by the Participants and selecting those equitable factors it deemed appropriate for consideration under the circumstances, based the [\*\*54] Clean Sites Report on such equitable factors... [and] supplied those equitable factors, or attempted in good faith to apply those equitable factors, evenhandedly and consistently with respect to all the Participants.... Clean Sites, in preparing the Clean Sites Report, attempted, as best it could, to replicate the result which would have occurred had the Court allocated responsibility pursuant to Section 113(f) of [CERCLA]." (Hyatt Aff. P 7.)

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Finally, the mediation team assisted the participants in reaching closure within the allocation process. Every party voicing an opinion has praised the steadfast and fair efforts of the mediation team and the supervision [\*285] and coordination provided by Magistrate Judge Rosen. Counsel for the United States participated informally in the allocation settlement process through the mediators. The United States has received self-disclosure of information from various settling parties and knows that "the participating parties' shares in the allocation were generated based upon various 'nexus theories' tying the parties to the Site through direct shipments and assorted transporters, the quality of the evidence of actual disposal at the Kramer Landfill, [\*55] the volume of waste shipped, and the relative toxicity of the waste." (Mem. of United States, at 7.) Further, the United States confirmed that "the allocation report also gave the municipalities a one-third discount due to their status, and allocated unattributable wastes *pro rata* among all participating parties." *Id.*

The court also finds that the underlying allocation and overall settlement embraced in the Consent Decrees are substantively fair. [HN6]Substantive fairness "goes to the fairness of the result, and requires that the settlement terms are 'based upon and roughly correlated with some acceptable measure of comparative fault....'" United States v. Atlas Minerals and Chems., 851 F. Supp. 639, 653 (E.D.Pa. 1994), quoting Cannons, 899 F.2d at 86. This requires the government to demonstrate a "plausible explanation" for "measuring comparative fault and allocating liability" in the amount set forth in the Consent Decree. Cannons, 899 F.2d at 87. Substantive fairness includes the "concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *Id.* The United States and the State have met this burden.

[\*56] The substantive fairness of the apportionment of liability derives from the carefulness with which it was determined in the arm's length bargaining process among many parties with adverse interests. There is a highly rational basis for the apportionment, articulated by the neutral evaluators and evidencing a successful good faith attempt to replicate the application of equitable factors to the facts and assumptions of each participant's comparative fault. A most telling measure of substantive fairness is the fact that the vast majority of participants followed through and ratified the non-binding allocation, with the advice of knowledgeable and experienced counsel.

The substantive fairness also derives from the extensive hard bargaining between the governments and the PRP representatives, and more specifically the counsel for the Settling Work Defendants (or "Offerors"). Untold hours of bargaining between and among these experi-

enced and creative counsel forged these Consent Decrees which provide a fair compromise of the parties' strongest and weakest positions; <sup>19</sup> [HN7]where this settlement "is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise [\*57] and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice ... a presumption of validity attaches to that agreement." United States v. Rohm and Haas, 721 F. Supp. at 681, quoting City of New York v. Exxon Corp., 697 F. Supp. 677, 692 (S.D.N.Y. 1988). Here, the federal and state environmental experts, armed with thorough knowledge of one of the most intensely studied Superfund sites in the nation, having also conducted confirmatory discovery and information exchange and having the benefit of a completed remedy now in its second year of full operation, negotiated fairly and struck a substantially fair compromise.

19 The reasonableness of the Consent Decrees, measured in terms of the overall stakes and litigation risks and the bearing of future risks, is addressed in Part III.C.2, below.

[HN8]The court has also considered whether the Consent Decrees are fair to non-settlers, as it is required to do. United States v. Rohm and Haas Co., 721 [\*58] F. Supp. at 680 ("effect of the proposed settlement on nonsettling parties" is a factor in approval of CERCLA consent decrees); Akzo Coatings, 949 F.2d at 1435; United States v. Charter Int'l Oil co., 83 F.3d 510, 522 (1st Cir. 1996). Only one non-settlor, Sun, has expressed any objection on this ground. Sun is concerned that, in compromising their overall claims at 77 percent of the highest damages estimate, [\*286] the federal and state Consent Decrees leave a 23 percent uncollected share which may impose too great a burden on non-settling parties, in the event a non-settlor is found to be jointly and severally liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

The short answer is that Sun, like every remaining non-settlor, is not a direct defendant in the Section 107(a) claims of the United States or State, and it is therefore not liable to imposition of joint liability for this site. As this court previously held, [HN9]CERCLA imposes joint and several liability for all response costs only upon direct defendants in Section 107(a) claims. Kramer, 757 F. Supp. at 414-16; United States v. Kramer, 953 F. Supp. 592, 599-600 (D.N.J. 1997). [HN10]Sun, like all non-settlers, will [\*59] occupy the position of a contribution defendant upon the claims for contribution brought on behalf of the Offerors Group of Settling Defendants, pursuant to Section 113(f)(1) of CERCLA. The liability of contribution defendants under Section 113(f) may be several, but it may not be joint. *Id.*

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As a contribution defendant, Sun's liability must first be proved by the contribution plaintiffs, and, if liable, then a suitable allocation of Sun's share must be determined taking into account such "equitable factors as the court deems appropriate" under CERCLA § 113(f)(1), applying federal common law including the factors reasonably calculated to assess Sun's proportionate fault. [Kramer, 757 F. Supp. at 412](#); [Kramer, 953 F. Supp. at 597-601](#). It has also been determined that contribution defendants which are found liable may be called upon to bear an equitable share of the "orphan share" of past and future remedial and response costs in this case. [Kramer, 953 F. Supp. at 601](#). The court declines to render an advisory opinion as to the future application of the other equitable factors that may apply to Sun if it is found liable for equitable contribution under CERCLA § 113(f)(1). [\*\*60]

20

20 That a non-settlor may be called upon to bear a disproportionate share of liability is also a possibility. See [Cannons, 899 F.2d at 91](#); [GenCorp., 935 F. Supp. at 934](#); [Arizona v. Motorola, Inc., 139 F.R.D. 141, 145 \(D. Ariz. 1991\)](#) (noting, "This risk of disproportionate liability encourages parties to resolve their liability early, lest they be found responsible for amounts not paid by settling defendants"). If it is demonstrated in the contribution action that the group of PRPs represented by the Offeror Group settled early and took on the risks of under-compensation or no compensation by non-settlers who were shown to be liable at trial, then an equitable apportionment, such as through application of the so-called "Gore factors," 126 Cong. Rec. 26,779 & 26,781 (1980), is permitted by § 113(f)(1), *see, e.g., Kramer, 953 F. Supp. at 598* & n.5; *American Cyanamid Co. v. Nascolite Corp.*, 1995 WL 934871 at \*7 (D.N.J. 1995), *quoting Environmental Trans. Sys., Inc. v. Ensco, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *See also, State of New Jersey, Dep't of Env'tl. Protection and Energy v. GEMS*, 821 F. Supp. 999, 1008 n. 15 (D.N.J. 1993). One of the listed "Gore factors" on the non-exclusive listing is "the degree of cooperation by the parties with federal, state, or local officials..." which may include the equitable distinction between parties who chose to take the risk of settling early and others, if proved to be similarly situated, who did not. This issue is not here decided but awaits the allocation phase of trial.

[\*\*61] Further, there is little or no likelihood that the present third-party defendants who are non-settlers can be joined as direct CERCLA defendants by the United States or by the State. It appears the statute of

limitations period for doing so expired by October of 1997, assuming no further response costs are incurred in the future. <sup>21</sup> For all those reasons, the court finds that the Consent Decrees are fair to non-settlers, who will continue to enjoy the benefit of pretrial preparation, dispositive motion practice and, if necessary, trial in accordance with the Federal Rules of Civil Procedure and Federal Rules of Evidence.

21 Under this court's ruling in this case, *United States v. Kramer*, slip op. (D.N.J. Feb. 25, 1998), [HN11]Section 113(g)(2) of CERCLA permits the United States to commence a subsequent action against new defendants until three years following the "completion of all response action" at the site. Assuming that the final recoverable expense was the additional work for cap repairs which concluded in October, 1994, the outermost boundary for the expiration of the limitations period would presently appear to have occurred in October of 1997.

#### [\*\*62] 2. Reasonableness of Consent Decrees

It has been held that [HN12]"a district court's reasonableness inquiry, like that of fairness, is a pragmatic one, not requiring precise calculation." [United States v. Charter](#), [\*\*287] [Int'l Oil Co.](#), 83 F.3d 510, 521 (1st Cir. 1996). To ascertain reasonableness, the court must make an independent determination of the technical adequacy of the work to be performed in cleansing and protecting the environment, whether the compensation to the public for response costs is satisfactory, and the risks and delays inherent in continuing the litigation. [Cannons, 899 F.2d at 89-90](#).

Here, the technical adequacy of the remediation under this settlement is not in question. <sup>22</sup> The remedy has been completed, the long-term operation and maintenance (O&M) have commenced, and fifteen months' experience of O&M managed by the Settling Work Defendants has been underway and have earned the State's expression of overall satisfaction with their performance. The settlement requires this O&M by the settling parties to continue through May 12, 2023 and to undertake the five-year reviews including any studies reasonably required by EPA. The Consent Decrees also place the incentive [\*\*63] for thorough and competent O&M squarely upon the settling parties who remain responsible for future response costs.

22 Throughout the litigation, the government's remedy, as carried out by the Army Corps of Engineers through private contractors, was disputed by PRP's as "overkill," that is, designed and executed in an unreasonably expensive, non-cost ef-

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fective manner. To the extent that the remedy is over-designed, this provides an extra measure of environmental protection. This court previously ruled that [HN13]allegations that the United States' costs were unreasonable and excessive did not provide a defense to cost recovery, United States v. Kramer, 913 F. Supp. 848 (D.N.J. 1995). Whether all claimed costs were consistent with the National Contingency Plan, however, has not been adjudicated.

The court also finds the compensation to the public to be satisfactory. The United States will recover \$ 95 million of a possible maximum of \$ 123 million for Remedial Investigation and Feasibility Study, the remedial design, [\*64] remedy construction, indirect and enforcement costs, and pre-judgment interest. This represents a 77% recovery of total costs. By way of compromise, the United States, through the upper levels of the U.S. Department of Justice and the U.S. Environmental Protection Agency, agreed to accept this sum, together with other covenants and undertakings by the settling parties, as appropriate to resolve all claims by the United States. This compromise appropriately takes into account such factors as the estimated volume and nature of the hazardous substances contributed to the Site by the settling parties and various "orphan" parties and the risks and expense of litigation necessary to pursue the case against the Direct Defendants through trial and judgment. (Mem. of United States at 6.)

Likewise, the State of New Jersey, through the Attorney General and the Department of Environmental Protection, assessed the monetary claims for § 107(a) costs and struck a similar balance by way of compromise, accepting the sum of \$ 9.77 million of its pre-May 1997 costs and 100% of its future costs at the site. The complexity and risks of litigation and the value of an early settlement freeing state resources [\*65] for O & M and remedial measures for use at other sites also spurred the compromise. (Mem. of State at 9.) The State's recovery likewise represents nearly 80% of the total past costs incurred by the State, while guaranteeing the continuation of operation and maintenance at the expense of the settling parties through the year 2023, together with paying the costs of future response actions through that time.

Damage to natural resources, while difficult to quantify, is also suitably addressed by these decrees. The New Jersey Department of Environmental Protection and the federal natural resource trustees in the U.S. Fish & Wildlife Service and the National Oceanic and Atmospheric Administration have studied the effect of the landfill upon its surroundings, especially Edwards Run and associated wetlands adjacent to the landfill which received some discharge of contaminated leachate and runoff. The

effects on migratory waterfowl and fresh water fish, as well as migratory fish, have been examined, since Edwards Run feeds Mantua Creek, which is tidally influenced from the Delaware River. No serious or prolonged degradation toward these species of aquatic life have been noted, yet damage to [\*66] the wetlands has been observed; hence, the State National Resource [\*288] Damage Consent Decree suitably requires the Settling Defendants to purchase wetlands and wooded uplands amounting to 151 acres, which will be preserved in perpetuity and conveyed by deed to the Township of West Deptford, together with payment of \$ 190,000 in damages compensation to the State. This perpetual restriction upon valuable open land (which is itself costing the settling parties an additional sum of \$ 968,614), consisting of a greater area than the affected wetlands, constitutes a gain for the public and a desirable resolution of the natural resource damage claims, and is consistent with N.J.S.A. 58:10-23.11g(a)(2). The federal Consent Decree requires compliance with the State's Decree as to these natural resources, consistent with Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C).

The settling parties are also paying a reasonable proportion of the overall liability when one considers the rather substantial fair share which would otherwise be payable by the owner/operator, Helen Kramer and her related entities, if she were not insolvent. The Kramer family were the active owners and operators of the [\*67] Superfund site which has made their name somewhat infamous. Although many tons of hazardous waste at this site cannot be linked to any other party, and the origin of many other tons is in dispute, it can all be linked to the Kramers, yet they are unable to contribute to the settlement and have been voluntarily dismissed as a direct defendant. The 77% compromise thus also reflects the governmental recognition that it would be unfair to place this entire owner/operator share upon this subset of other PRPs whose "ideal" share of liability -- "based on perfect knowledge of harm caused by [these] parties only, expressed as a proportion of the total costs of remediation at the site," Kramer, 953 F. Supp. at 595 - is undoubtedly less than the compromise figure reached for this group. These parties are paying a disproportionate share of their liability measured in "ideal" terms, leavened, however, by the risk that their ultimate share of liability to the United States as direct defendants could be 100% by operation of joint and several liability under § 107(a) of CERCLA, as previously discussed. The monetary incentive to settle litigation occurs at that point where the risks of litigation [\*68] move the government and the settling parties away from their respective "ideal" positions of 100% recovery for the government versus only the proportionate "ideal" share for a PRP. That balance has been reasonably struck in these consent decrees.



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The court further finds that the risks of litigation have been reasonably appreciated by the settling parties. The State of New Jersey aptly points out:

The settlement is also reasonable in light of the complexity of the various liability cases to be made against various Defendants. The matters in dispute arise out of the operation of a landfill as far back as 30 years ago. Memories are inexact. Key witnesses have died. The documentary record is voluminous, complex, and in certain respects, not complete.

Mem. of State at 9.

The United States, too, has properly acknowledge the risks and costs of bringing the matter to trial, given the relative strengths and weaknesses of the parties' litigating positions. (Mem. of United States at 23.) For example, issues remained regarding the scope of review to be applied to post-ROD (record of decision) design changes by the EPA which may have significantly changed the approved remedy, [\*\*69] as to which the direct defendants may have argued that such changes were not in accordance with law or were otherwise inconsistent with the National Contingency Plan. The court mentions, but does not rule on, some of the competing litigation positions, since such a ruling would require an adjudication of merits that can only be performed after discovery and trial, and not in the context of examining the reasonableness of a proposed consent decree; to do so would be at cross-purposes with CERCLA's goal of promoting compromise settlement. Comerica Bank-Detroit v. Allen Indus., 769 F. Supp. 1408, 1411-12 (E.D. Mich. 1991); Arizona v. Motorola, Inc., 139 F.R.D. 141, 148 (D. Ariz. 1991).

Finally, the court finds that the consent decrees are reasonable in placing the risks of future uncertainties upon the settling parties [\*\*289] rather than the governments. For example, the decrees are subject to "reopener" in the event EPA determines that previously unknown conditions or information indicate that the remedial actions are not protective of the human health or the environment. The Settling Defendants, however, have obtained the repose offered by contribution protection under § 113(f)(2) [\*\*70] of CERCLA, by extinguishing the contribution claims of other parties against the Settling Defendants with respect to the Site.

Taking all these factors into account, the court has no hesitation in finding that these Consent Decrees are reasonable.

### 3. Consistency with CERCLA

The mandate of CERCLA is to remedy releases of hazardous substances into the human environment by imposing the burdens of remediation and of future risks upon parties liable for causing the harm, consistent with due process. Similarly, under the Spill Compensation and Control Act, the New Jersey Legislature has declared the State's policy "to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such substances...." N.J.S.A. 58:10-23.11a. These Consent Decrees will serve these public interests.

CERCLA encourages prompt and effective cleanup by responsible parties, while preserving both public finances and public health. The decrees largely replenish the CERCLA Superfund and the New Jersey Spill Fund, which constitute limited public resources, [\*\*71] enabling the funds to be used at other sites. (See, e.g., 131 Cong. Rec. H11,070 (Dec. 5, 1985) (Statement of Rep. Florio); N.J.S.A. 58:10-23.11r.) Further, the Settling Defendants' agreement to perform the five year reviews likewise frees public money to be devoted to other sites where public health and the environment are threatened. The settlements have also well served CERCLA's goal of reducing litigation and transaction costs, see Cannons, 899 F.2d at 90; Rohm & Haas Co., 721 F. Supp. at 696. By simplifying the remaining litigation, which is reduced to a contribution recovery action by the settlors against a few remaining alleged PRPs, the public and the parties benefit from the "saving of time and money that results from the voluntary settlement of litigation." Citizens for a Better Env't v. Gorsuch, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1126 (D.C. Cir. 1983), cert. denied sub nom. Union Carbide Corp. v. NRDC, 467 U.S. 1219, 81 L. Ed. 2d 373, 104 S. Ct. 2668 (1984). Likewise, the savings of governmental litigation resources of experienced counsel and staff may now instead be devoted to other pressing cases where litigation is necessary.

The tangible benefits [\*\*72] of containment, remediation, and restoration of a healthy environment for humans, animals, and plants, and the perpetual preservation of pristine lands in the vicinity, are the highest manifestation of the public benefits of these decrees, all of which this court finds to be faithful to the mandates of CERCLA.

### IV. CONCLUSION

After eight years of litigation and settlement processes, and after an independent review of the procedural and substantive fairness, reasonableness, and fidelity to the public interest embodied by the Federal Consent Decree, the State Consent Decree, and the State Natural

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Resource Damages Consent Decree, this court concludes  
that these decrees should be approved and entered.<sup>23</sup>

of the United States be these: the  
settlement is fair.

23 This court notes the eloquent concluding ob-  
servation of counsel for the United States, who  
said in her Reply Memorandum at 12:

Literally hundreds of thousands  
of words of advocacy have been  
submitted to this Court in this case  
over the years. Let the final words

This court agrees.

[\*\*73] *September 3, 1998*

Date

JEROME B. SIMANDLE

U. S. District Judge